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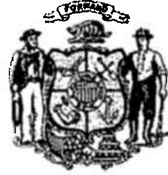

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JOINT REVIEW COMMITTEE
ON CRIMINAL PENALTIES

LRB-2859/1

COMMITTEE REPORT -- 2009 ASSEMBLY BILL 283

[Introduced by Representatives Staskunas, Zepnick, Smith, Zigmunt, Hintz, Sheridan, Black, Turner, Clark, Mason, Nelson, Hixson, Hebl and Berceau; cosponsored by Senator Carpenter.]

Background

2009 Assembly Bill 283 was introduced in the Assembly on May 27th, 2009 by Representative Tony Staskunas. The bill makes various changes to criminal penalties applied to criminal and forfeiture actions of Operating While Intoxicated (OWI).

The bill received a unanimous recommendation for passage (7-0) on June 30th from the Assembly Committee on Public Safety. The bill was amended by Assembly Substitute Amendment 1 on September 17th, and subsequently unanimously adopted by the Assembly. On October 15th, Senator Lena C. Taylor, chair of the standing committee to which the bill was referred, requested a report of the Joint Review Committee on Criminal Penalties on the bill pursuant to s.13.525(5)(a) & (b). This section of statutes requires a report to be prepared concerning all of the following:

1. The costs that are likely to be incurred or saved by the department of corrections, the department of justice, the state public defender, the courts, district attorneys, and other state and local government agencies if the bill is enacted.
2. The consistency of penalties proposed in the bill with existing criminal penalties.
3. Alternative language needed, if any, to conform penalties proposed in the bill to penalties in existing criminal statutes.
4. Whether acts prohibited under the bill are prohibited under existing criminal statutes.

This report addresses these statutory points to Engrossed Assembly Bill 283.

Costs or savings

For a description of the cost and savings analysis of this bill, please see the attached Legislative Fiscal Bureau Memo dated October 2nd, 2009, addressed to Senators Decker, Sullivan, and Taylor (attached).

The below table outlines the annualized costs to all state agencies affected by the Engrossed bill according to the LFB. (LFB Memo, 10.2.09)

TABLE 4

Annualized State Costs Associated with Engrossed AB 283

Agency	Funding
Corrections*	$68,390,200
District Attorneys**	543,400
Public Defender ***	232,500
Justice	1,735,200
Total	$70,901,300

*Corrections costs assume that inmates would be housed in state prisons. Corrections costs could be reduced to $31,179,700 annually if contract beds were utilized, and it is assumed that 31%, rather than 50%, of felony fourth offenders are sentenced to prison. Under Engrossed AB 283, costs would be partially funded by $20 million annually provided from the beer and liquor taxes.

**Under Engrossed AB 283, costs would be offset by $2.7 million in annual revenue generated from the new district attorney fee.

FURTHER NOTES ON TABLE 4 REGARDING COST & SAVINGS

This committee includes the annualized costs to the state court system associated with Engrossed AB 283. This change reflects the costs of 1.6 new judgeships that the Legislative Fiscal Bureau (LFB) memo of October 2, 2009 describes (page 11). The data in the LFB memo derives from a September 30, 2009 memo from the Director of State Courts office analyzing the fiscal impact of Engrossed AB 283. The Director of State Courts office had earlier listed the costs of creating a new judgeship as $267,452. That includes the following:

Salary and benefits for judge and court reporter:	$232,941
Cost of library materials:	$2,401
Computer hardware and maintenance:	$32,110

The total cost of 1.6 judgeships is, therefore, $427,900.

**While the Legislative Fiscal Bureau projects annual costs of $534,000 to District Attorneys based upon reclassifying 4th-offense OWI as a felony and reclassifying second- and third-OWI causing injury as a felony, this Committee finds that those amounts are based on a weighted caseload analysis that considerably understates the average time an OWI-felony case takes to prosecute. Compared to other felony classifications, OWI cases tend to be more fiercely litigated, are more likely to go to trial, are more likely to involve expert witnesses, and are frequently the subject of specialized motion practice, including collateral attacks to previous convictions and additional suppression motions. This Committee estimates a cost of $1,276,000 due to reclassifying 4th-offense OWI as a felony and

reclassifying 2nd- and 3rd-offense OWI causing injury as a felony is based on the assumption that the average OWI case consumes 17.68 hours to prosecute, roughly twice as much time as the average non-homicide felony. This Committee believes its estimate to be conservative for the reasons listed below.

**The amount listed is the estimate for the effect of reclassifying 4th-offense OWI as a felony and reclassifying 2nd- and 3rd-offense OWI causing injury as a felony. The bill creates additional obligations on district attorneys which are not subject to quantification from available data but are expected to substantially increase District Attorney costs:

- Additional criminal cases resulting from lower PAC level;
- Additional criminal cases, such as bail jumping, resulting from violations of ignition-interlock requirements;
- Additional criminal cases resulting for felon in possession of firearm (resulting from classification of more OWI convictions as felonies);
- Additional criminal cases resulting from classification of certain first-offense OWI offenses as criminal offenses;
- Additional criminal cases resulting from longer period of time that persons incarcerated for OWI will be subject to revocation of driving privileges;
- Additional contempt proceedings resulting from non-payment of increased court-ordered financial obligations;
- Additional time for handling misdemeanor prosecutions and appeals that can reasonably be expected because reclassifying 4th-offense OWI as a felony will increase the stakes of a misdemeanor convictions, creating an incentive for defendants to more aggressively contest misdemeanor convictions; and
- Additional contested cases due to closing ".1 loophole," which may decrease plea flexibility in close cases.

***The amount listed is the estimate for the effect of reclassifying 4th-offense OWI as a felony. Several other provisions of the bill would also result in substantially-increased Public Defender costs. Because the following costs are not presently quantifiable from available data, they will need to be funded through the budget process in the future.

- Additional criminal cases resulting from lower PAC level;
- Additional criminal cases resulting from violations of ignition-interlock requirements;
- Additional felony cases resulting from increased penalties for certain OWI offenses causing an injury;
- Additional criminal cases resulting for felon in possession of firearm (resulting from classification of more OWI convictions as felonies);
- Additional criminal cases resulting from classification of certain first-offense OWI offenses as criminal offenses;
- Additional criminal cases resulting from longer period of time that persons incarcerated for OWI will be subject to revocation of driving privileges;
- Additional contempt proceedings resulting from non-payment of increased court ordered financial obligations; and

- Additional revocation cases resulting from longer terms of imprisonment and from expanded authority to place persons on probation following conviction for OWI.

Local costs are not accounted for in the Legislative Fiscal Bureau memo nor specified in original fiscal estimates for the bill prior to amendments. The Wisconsin Counties Association, which represents county interests, issued a memo, dated October 15th, 2009, (attached) to the Legislature regarding the local costs of this bill and SB 66. The memo requests state action on local cost estimates but does not provide any local information or cost estimates on provisions in Engrossed Assembly AB 283.

The Legislative Fiscal Bureau analysis of AB 283 does not take into consideration available data from New Mexico and other states regarding the effect Ignition Interlock Devices (IID's) have on recidivism rates. New Mexico requires that Ignition Interlock Devices be placed on all OWI offenders' vehicles after the first offense. Data from New Mexico suggests that such provisions can reduce second and subsequent OWI convictions by as much as 65 percent while the IID is in place on the offender's vehicle. AB 283 requires IID installation for all repeat offenders and for first offenders who test positive for a Blood Alcohol Content in excess of .15 percent. Based on the available data from New Mexico and other states, AB 283's IID provisions could reduce the fiscal impact of this legislation below the projections contained in the attached LFB memos.

Citations:
http://www.ndaa.org/publications/newsletters/between_lines_vol_16_no_1_2007.pdf
http://aja.ncsc.dni.us/courtrv/cr39_4/CR39-4Fulkerson.pdf
http://www.centurycouncil.org/files/ignitioninterlockfacts.pdf

The cost estimates above reflect estimates from all the affected justice agencies that their costs will increase because of an increased number of criminal cases and longer terms of incarceration. In recognition of the scope of its statutory authority, the committee did not review comprehensive research regarding the likelihood that this bill would reduce the number of impaired drivers in Wisconsin.

The committee is aware of research regarding how to reduce substance abuse (including alcohol abuse), and the committee notes that the long-term costs (both human and financial) of OWI enforcement will depend on the State's adoption of effective prevention strategies. The bill contains some provisions that, if properly funded, will expand treatment for substance abuse and, in turn, are likely to reduce recidivism and thus help to reduce impaired driving in Wisconsin. Specifically, the bill expands the option of placing defendants on probation in OWI cases and expands the Winnebago County alternative sentencing and probation program.

A July 2007 Legislative Audit Bureau report indicated a statewide shortage of over 117 FTE state prosecutors according to the application of a weighted caseload formula. This shortage has not been addressed since the report was completed. While the Committee does not believe it is appropriate to assign the costs of this shortage to the OWI bills under evaluation, it finds that unfunded increased prosecutorial time spent on OWI cases necessarily means less prosecutorial time spent on other

matters and will exacerbate the effects of this statewide prosecutor shortage. Spending less time on other prosecutions or declining to prosecute cases with merit will increase unquantifiable costs associated with unenforced crime.

Consistency of penalties

Engrossed Assembly Bill 283 makes various changes to the penalties resulting from conviction for operating while intoxicated. These changes are outlined in the attached LFB memo, dated October 6th, 2009, addressed to Senators Decker, Sullivan, and Taylor (attached).

Alternative suggestions

In an effort to create graduated penalties, a felony reclassification is suggested for those convicted of 4th Offense OWI (within 5 years of previous conviction). Engrossed AB 283 uses the Class H felony structure ($600-$10,000 fine; 6 months to six years term of imprisonment; or both). A Class H Felony penalty structure is also used for conviction for 5th offense OWI, under current law.

A graduated penalty structure more appropriately uses a Class I Felony classification for the 4th offense provision in the bill. This classification calls for a fine not to exceed $10,000 and imprisonment not to exceed 3 years, 6 months; or both. While it is likely that such a change will result in cost savings, it is unclear whether these savings would be significant.

Duplication in statutes

In reviewing the statutes and the bill there is *not a clear duplication* for the crime of operating while intoxicated.

Findings of the committee

The Joint Review Committee on Criminal Penalties finds that 2009 Engrossed Assembly Bill 283 has an estimated state cost in the range of 37,210,500 to 72,061,800 dollars depending on the number of offenders sentenced to prison and whether inmates would be housed in state prisons. This cost may be lower due to increased use of contract beds and lower assumptions of felony charges for 4th offense OWI. A new district attorney surcharge may offset costs by 2.7 million dollars. The proposed penalty structure for Engrossed AB 283 is consistent with felony classifications adopted in Wisconsin. A graduated felony structure for the 4th offense OWI is suggested by moving the penalty structure for that crime to a Class I felony. There is not a clear duplication of the Operating While Intoxicated laws with other provisions of statute in this bill.

Legislative Fiscal Bureau
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October 2, 2009

TO: Senators Decker, Sullivan, and Taylor

FROM: Jon Dyck, Chris Carmichael, Paul Onsager and Jere Bauer

SUBJECT: Engrossed Assembly Bill 283

At your request, we are providing information regarding Engrossed Assembly Bill 283, which makes various changes to the state's operating while intoxicated laws.

Assembly Bill 283 was introduced on May 27, 2009, and referred to the Assembly Committee on Public Safety. On June 17, 2009, that Committee took executive action on the bill, recommending the bill for passage on a 7-0 vote, as amended by Assembly Amendment 1. On September 15, 2009, the bill was placed on the Assembly calendar for September 17, 2009. On September 17, 2009, Assembly Substitute Amendment 1 to AB 283 was introduced. The Assembly adopted Assembly Amendment 2 and Assembly Amendment 5 to Assembly Substitute Amendment 1, and passed that amendment, as amended, on a vote of 95-0. The bill was messaged to the Senate on September 18, 2009, printed engrossed on September 23, 2009, by order of the Senate Chief Clerk, and referred to the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing.

SUMMARY OF ENGROSSED ASSEMBLY BILL 283

Engrossed AB 283 would make several changes to provisions related to operating while intoxicated (OWI) offenses, including various changes to penalty provisions for specific OWI violations, general changes to OWI sentencing and probation provisions, and changes to ignition interlock device provisions. Unless otherwise noted, these changes, described below, would take effect on the first day of the third month beginning after publication of the act.

Modify Penalty Provisions for Certain OWI Offenses

Engrossed AB 283 would modify the penalty provisions for certain operating while intoxicated and other alcohol-related violations. In this memorandum, reference to a "basic OWI

offense" refers to operating a motor vehicle while intoxicated, while under the influence of an intoxicant, with a prohibited blood alcohol concentration, or with a detectable amount of any restricted, controlled substance in his or her blood. Under current law, however, various penalties and court orders for a basic OWI offense depend upon the number of a person's prior basic OWI offense convictions plus the number of other related convictions. In this memorandum, the term "prior OWI offenses" refers to these offenses, and includes: (a) a basic OWI offense, as described above; (b) causing injury, great bodily harm, or death while operating a motor vehicle while intoxicated (including, for great bodily harm and death offenses, operating a commercial motor vehicle with a blood alcohol level of between 0.04 and 0.08); (c) license revocations for refusing to provide a sample of blood, breath, or urine upon request of a law enforcement officer for chemical testing ("implied consent refusal"); (d) violations of local ordinances or laws of other jurisdictions similar to the violations under (a), (b), and (c); and (e) operating an aircraft with a prohibited alcohol concentration or under the influence of intoxicating liquor or a controlled substance. The penalty changes under the engrossed bill are as follows:

Criminalize first offense OWI with a minor passenger. Under the engrossed bill, a person convicted of a first basic OWI offense violation would be guilty of a criminal offense if there was a minor passenger under 16 years of age in the motor vehicle at the time of the violation, subject to a fine of between $350 and $1,100, and a term of imprisonment of not less than five days nor more than six months (the current law penalties for a second, basic OWI offense). Under current law, a first basic OWI offense with a minor passenger results in the doubling of the minimum and maximum forfeitures for the offense, or $300 to $600, but the offense is a civil forfeiture. Under the engrossed bill, a first basic OWI offense violation without a minor passenger would remain a non-criminal offense, subject to a forfeiture of $150 to $300.

Criminalize absolute sobriety offense with a minor passenger. The engrossed bill would criminalize violations of the prohibition against operating a motor vehicle with a blood alcohol level above 0.0, but less than 0.08, by a driver who has not attained legal drinking age ("absolute sobriety" violation), if there was a minor passenger under 16 years of age in the vehicle at the time of the offense. Under current law, such a violation is punishable with a civil forfeiture of $400, while under the engrossed bill, it would be punishable by a criminal fine of $400.

Felony classification for certain fourth-offense OWI violations. The engrossed bill would specify that a fourth basic OWI offense is a Class H felony if the offender had at least one prior OWI offense within the previous five years of committing the fourth offense. The minimum fine would be $600 and the minimum term of imprisonment would be six months. (A Class H felony is punishable by a maximum fine of $10,000 and/or three years in prison and three years on extended supervision.) Under current law, a fourth basic OWI offense is a misdemeanor offense, punishable by a fine of not less than $600 nor more than $2,000 and a jail term of not less than 60 days nor more than one year.

Felony classification for repeat OWI offenses resulting in injury. The engrossed bill would specify that causing an injury while operating while intoxicated, including an offense involving the operation of a commercial motor vehicle with a blood alcohol level of between 0.04 and 0.08, is a

Class H felony if the person had one or more prior OWI offenses. The bill would not specify a minimum fine or term of imprisonment for these offenses, although the current law maximums for a Class H felony would apply. Also, the engrossed bill would specify that the maximum fine and term of imprisonment would be doubled if there was a minor passenger under 16 years of age at the time of the violation. Under current law, these offenses are misdemeanors, punishable by a criminal fine of $300 to $2,000 and a jail term of 30 days to one year. If there was a minor in the vehicle at the time of the offense, however, these offenses are considered a felony under current law and the minimum and maximum fines and periods of imprisonment are doubled.

General Changes to OWI Sentencing Related to Imprisonment and Probation

The engrossed bill would make several changes to provisions related to terms of imprisonment and probation for OWI offenders, as follows:

Minimum period of confinement for OWI offenders with multiple prior offenses. The engrossed bill would specify that the confinement portion of a bifurcated sentence must be not less than three years for a person convicted of a seventh, eighth, or ninth OWI offense, and not less than four years for a person convicted of a tenth or subsequent OWI offense. Under current law, a seventh, eighth, or ninth OWI offense is classified as a Class G felony, punishable by a fine of up to $25,000 and a term of up to 10 years (five years imprisonment and five years extended supervision), and a tenth or subsequent OWI offense is classified as a Class F felony, punishable by a fine of up to $25,000 and a term of up to 12 years and six months (seven and a half years imprisonment and five years extended supervision). There is currently no mandatory minimum period of confinement specified for these offenses.

No pre-sentence release and no stay of execution for prison sentences for certain multiple-OWI offenders. The engrossed bill would specify that a person with three or more OWI offenses is not eligible to be released following a criminal conviction, but prior to sentencing, and a sentencing judge may not stay the execution of the sentence for such an offender until after the person has served at least the minimum term of confinement for the violation. [This provision would apply to any criminal conviction, not just a conviction for an OWI offense. If the intent is to make the provision applicable only following an OWI conviction, the bill should be amended to make this clarification.]

Probation for OWI offenders. The engrossed bill would delete a current law provision that disallows probation for a person convicted of a second or third OWI offense. This change would allow a court to order a term of probation for these offenders for a period of between six months and two years, although the current law provisions under which these OWI offenders are given probation require the offender to serve a jail term as part of the probation equal to at least the minimum sentence for the offense.

Extend Winnebago County alternative sentencing and probation program to all counties. The engrossed bill would allow courts to use an alternative sentencing option for certain OWI offenders who successfully complete a period of probation that includes alcohol and other drug

treatment, effective on the day after publication of the bill. Under the alternative sentencing structure, which is currently available only in Winnebago County, but would be available to any county that opts to have such a program under the engrossed bill, the periods of imprisonment for OWI-related offenses are modified, as follows: (a) for a second OWI offense or an offense of operating a commercial motor vehicle with a blood alcohol level of between 0.04 and 0.08 by a person with one prior OWI offense, the maximum term of imprisonment is reduced from 30 days to seven days (the minimum term remains five days); (b) for a third OWI offense or an offense of operating a commercial motor vehicle with a blood alcohol level of between 0.04 and 0.08 by a person with two prior OWI offenses, the minimum term of imprisonment is reduced from 30 days to 10 days; and (c) for an offense of causing injuring while operating a vehicle while intoxicated or operating a commercial motor vehicle with a blood alcohol level of between 0.04 and 0.08, if the offender has no prior OWI convictions, the minimum sentence is reduced from 30 days to 15 days.

Ignition Interlock Device Provisions

Engrossed AB 283 would make several changes to ignition interlock device provisions, effective on the first day of the ninth month beginning after publication of the act, as follows:

Mandatory ignition interlock device order for certain offenses. The engrossed bill would require courts to order a person's operating privileges to be restricted to operating a vehicle equipped with an ignition interlock device ("IID operating privilege restriction") following: (a) an implied consent refusal; (b) an OWI conviction where the person had a blood alcohol level of 0.15 or above; or (c) an OWI conviction by a person who has at least one prior OWI offense. Under current law, courts are allowed, although not required, to order an IID operating privilege restriction for a second or subsequent OWI offense, but are required to order an IID operating privilege restriction for a second or subsequent OWI offense committed within five years of the previous offense. If a court orders an IID operating privilege restriction under these current law, mandatory provisions, the court is also required to order that each motor vehicle for which the offender's name appears on the certificate of title or registration be equipped with an ignition interlock device ("vehicle IID order"), except that in cases of financial hardship the courts may exclude one or more vehicles from this order, or the court may, instead, order that the vehicle or vehicles be seized and forfeited or immobilized for a specified period. The engrossed bill would require courts to issue a vehicle IID order in all circumstances where an IID operating privilege restriction is ordered (while continuing to allow for the financial hardship exception) and would eliminate the option to substitute a vehicle seizure or immobilization order for a vehicle IID order.

Time periods. The engrossed bill would specify that the IID operating privilege restriction would begin on the date that the Department of Transportation issues any driver's license to the offender, but that the court may order that the vehicle IID order be effective immediately upon the issuance of the order. Under current law, an IID operating privilege restriction and a vehicle IID order must be for a period of not less than one year nor more than the maximum operating privilege revocation period for the OWI offense. The engrossed bill does not change these provisions with respect to an IID operating privilege restriction, but eliminates references to the period of the vehicle IID order, thereby leaving such periods unspecified. [The maximum period of revocation

for OWI offenses ranges from nine months, for a first offense, to three years, for a third or subsequent offense. By making certain first time OWI offenders subject to an IID operating privilege restriction (those with a blood alcohol concentration of 0.15 or more), the engrossed bill would create a contradiction, since such a restriction could not be for less than one year under the engrossed bill, but also could not exceed the maximum period of revocation for the offense, which is nine months.]

Ignition interlock device surcharge. The engrossed bill would create a $50 surcharge, to be imposed for any IID operating privilege restriction order. The court would be required to transmit the surcharge to the Department of Transportation and DOT would be required to pay $40 of each surcharge payment that it receives to the sheriff of the county where the fee was collected. Amounts retained by the Department would be deposited in a PR appropriation for expenditures related to administering the ignition interlock device program.

Provisions for persons with low household income. The engrossed bill would create an exception to a current law provision that specifies that an offender subject to an IID vehicle order is liable for the cost of installing and maintaining each ignition interlock device. Under the exception, a court would be required to limit the offender's share of the installation and maintenance cost to one-half of the full cost if the court finds that the person has a household income that is at or below 150% of the nonfarm federal poverty line for the continental United States, as defined by the federal Department of Labor. The engrossed bill does not specify how the other 50% of the installation and maintenance cost would be paid.

Occupational license provisions. The engrossed bill would prohibit DOT from issuing an occupational license to a person for whom a court has issued an IID operating privilege restriction until the person pays the $50 ignition interlock device surcharge and submits proof that an ignition interlock device has been installed in each motor vehicle for which the person's name appears on the vehicle's certificate of title or registration.

Enforcement provisions and penalty for violations. The engrossed bill would specify that a person who holds an occupational license with an IID restriction or is subject to a IID order by a court is guilty of violating that restriction or order if he or she removes or disconnects an ignition interlock device or otherwise tampers with or circumvents the operation of the device. The engrossed bill would also modify a current law vehicle equipment provision that prohibits any person from removing, disconnecting, tampering with, or otherwise circumventing the operation of an ignition interlock device to include, as a violation, the failure to have an ignition interlock device installed as ordered by a court. The engrossed bill would modify the penalty for violations of this provision by replacing the civil forfeitures ($150 to $600, at the discretion of the court), with criminal penalties. Under the engrossed bill, the court could impose a fine of between $150 and $600, a term of imprisonment of up to six months, or both. In addition, the court would be required to extend the IID order by six months for each violation.

Prohibited alcohol concentration. The engrossed bill would establish the prohibited blood alcohol concentration for a person subject to an IID operating privilege restriction at 0.02. Such a

person operating a motor vehicle with a blood alcohol content at or above that level could be found guilty of an OWI offense.

Other Provisions

Revocation time periods. The engrossed bill would modify provisions related to license revocation for OWI violations or implied consent refusals to specify that any time that a person is imprisoned does not count toward the revocation period. The bill would specify that it is the person's responsibility to notify the Department of Transportation when he or she is released from prison.

Elimination of penalty exceptions for offenders with a blood alcohol level less than 0.10. The engrossed bill would eliminate provisions that exempt persons who are convicted of a first-time OWI offense with a blood alcohol level of at least 0.08, but less than 0.10, from the payment of various penalty surcharges and court fees and alcohol assessment requirements. As amended, the engrossed bill would require all OWI offenders to pay these surcharges and court fees, and be subject to an alcohol assessment.

District attorney surcharge. The engrossed bill would create a $100 district attorney surcharge, to be imposed for any conviction for an OWI offense, including the offense of operating a commercial motor vehicle with a blood alcohol concentration of between 0.04 and 0.08. The clerk of courts or municipal court clerk would be required to collect and transmit the amount collected to the county treasurer or municipal treasurer, who would be required to transmit the collected amounts to the Secretary of the Department of Administration. These amounts would be credited to a PR appropriation for District Attorneys for operating while intoxicated prosecutions.

Allocation of certain beer and liquor tax revenues to the Department of Corrections. The engrossed bill would allocate the first $10,000,000 collected in each fiscal year from the fermented malt beverages tax and the first $10,000,000 collected in each fiscal year from the liquor tax to a new PR appropriation in the Department of Corrections for services and programs for persons who have been convicted of offenses related to intoxicated driving. The engrossed bill would prohibit the Department of Corrections from using funds in the new PR appropriation to supplant moneys allocated to provide services related to these programs for persons who were convicted of offenses not related to intoxicated driving.

FISCAL EFFECT

This section provides information on the fiscal impact of Engrossed AB 283, based on fiscal estimates submitted by agencies for the original bill, with updates to reflect the changes included in the engrossed bill, as passed by the Assembly.

Department of Transportation

In its fiscal note for AB 283, the Department of Transportation estimates that the Division of Motor Vehicles would incur increases in workload associated with various provisions of the bill, requiring 2.8 additional positions at an annual cost of $139,900. The additional workload would be associated with increases in the number of driver's license revocations resulting from additional OWI convictions and an increase in the number ignition interlock device orders recorded in the driver record file.

In addition to the annual cost, the Department indicates that the provision related to tolling the revocation period for the time that an OWI offender is imprisoned would require data processing modifications at a one-time cost of $57,240.

The Department's fiscal note also estimates the additional revenue that would be generated by the ignition interlock device surcharge. According to DOT's estimate, it is estimated that 36,655 offenders would be subject to the IID surcharge. The Department assumed that the full $50 would be collected for each offender, meaning that a total of $1,832,750 would be collected. Of this amount, $366,550 would be kept by the Department and appropriated for costs of administering the ignition interlock device program, while sheriffs would receive $1,466,200.

It should be emphasized that this estimate is based on the assumption that the full $50 surcharge would be collected for each offender. However, it is not unusual for an offender to fail to pay criminal surcharges or pay only a portion of the amount. For instance, in aggregate, only about two-thirds of the total amount of operating while intoxicated driver improvement surcharge that is assessed is actually collected. If just two-thirds of the proposed IID surcharge is collected, the total amount collected would be approximately $1,228,000. Of this amount, the Department would retain about $247,000 while the sheriffs would receive $981,000.

District Attorneys

Under current law, a fourth OWI offense is a misdemeanor offense. Under the engrossed bill, a fourth OWI offense would now be a Class H felony if the offender had at least one prior OWI violation within the previous five years of committing the fourth offense. According to DOT, there were 1,902 fourth offense OWI convictions in 2007. Assuming a 95% conviction rate, in 2007, there were 2,002 individuals charged with committing a fourth offense OWI violation. The Department of Transportation further indicates that approximately 65% of fourth offense violations are committed within five years of the third offense. As a result, it is estimated that 1,301 of these fourth offense OWI cases in 2007 involved individuals who had committed the offense within five years of a prior offense.

Under the Wisconsin District Attorneys Association (WDAA) weighted caseload analysis, it is estimated that, on average, a prosecutor will require 1.68 hours to complete a criminal traffic case. Under the WDAA analysis, it is further estimated that, on average, a prosecutor will require 8.49 hours to complete a felony case. While the WDAA has expressed concerns that the current

case weights in its weighted caseload analysis may in many instances understate the amount of time actually required to complete these cases, utilizing the current WDAA weighted caseload analysis, every fourth offense OWI violation converted to a felony would, on average require an additional 6.81 hours to prosecute [8.49 hours for a felony case minus 1.68 hours for a criminal traffic case]. Assuming that the engrossed bill would convert 1,301 fourth offense OWI violations annually to felony offenses, the State Prosecutors Office estimates that the law change under Engrossed AB 283 would require an additional 8,860 prosecutorial hours annually. Under the WDAA weighted caseload analysis which assumes that a full-time prosecutor has 1,227 hours annually available to prosecute cases, the increased workload associated with this change would require 7.2 additional prosecutors statewide. The State Prosecutors Office estimates additional salary and fringe benefits costs of $471,400 annually to create 7.2 additional prosecutors statewide.

The engrossed bill would also provide that causing an injury while operating while intoxicated would be a Class H felony if the person had one or more prior OWI offenses. Based on 2007 DOT data, there were 119 convictions for a second OWI offense causing injury and 46 convictions for a third offense OWI causing injury. Assuming that none of these injuries involved the infliction of great bodily harm (which is already a Class F felony under current law), this provision of the engrossed bill could lead to an estimated 165 additional felony cases annually (as second and third OWI offenses are misdemeanor offenses). Assuming that there were additional cases that were prosecuted or investigated but for which no conviction was obtained, the State Prosecutors Office assumed that as a result of this provision an additional 200 OWI misdemeanor cases annually would become felony cases.

Again assuming that for each criminal traffic case converted to a felony case that an additional 6.81 prosecutor hours would be required, this additional caseload would require an additional 1,362 prosecutorial hours annually. As the WDAA weighted caseload analysis assumes that a full-time prosecutor has 1,227 hours annually available to prosecute cases, this increased workload associated with this change would require an additional 1.1 prosecutors statewide at an annual cost of $72,000.

The engrossed bill would also: (a) increase the mandatory minimum sentences for fourth, seventh, eighth, ninth, and tenth OWI offenses; and (b) criminalize a first offense OWI violation if there was a minor passenger under 16 years of age in the motor vehicle at the time of the violation. Prosecutors have expressed the opinion that these law changes would also be anticipated to increase their workload.

In regards to this estimate, it should be noted that the identified statewide need for additional prosecutorial resources would be divided between 71 county DA offices. It could be argued that for many smaller DA offices, the incremental increased need associated with these changes would not justify the creation of a small fraction of an additional prosecutor. As a result, costs could be less than that identified here.

In addition, it should be noted that in July, 2007, the Legislative Audit Bureau (LAB) published an audit of the current WDAA weighted caseload analysis. The LAB found that the

current caseload measurement of prosecutorial workload uses incomplete data and out-of-date measures of the time required to prosecute cases. In addition, the audit found that variations in charging practices between DA offices may lessen the reliability of the current caseload measure. As of this writing, the WDAA has neither updated the caseload measurements of the time required to prosecute cases, nor agreed to any standard charging practices. As a result, the reliability of the current caseload measurement for identifying need and allocating prosecutors on a statewide and county-by-county basis may be questioned. On the other hand, increasing the annual OWI felony caseload under the engrossed bill would certainly increase the workload for county DA offices.

Office of the State Public Defender

As with the district attorney function, the Office of the State Public Defender (SPD) estimates that converting 65% of the OWI fourth offense caseload from misdemeanor offenses to felony offenses would have a significant fiscal impact on the Office. It estimates that an additional 1,301 OWI fourth offense felony cases annually would require additional staffing of 2.2 attorneys, 0.75 legal secretary, and 0.3 investigator at a first year cost of $259,900, and an ongoing cost of $232,500 annually.

It is the belief of the SPD that other provisions of the engrossed bill could also substantially increase its workload and costs, but these other workload and cost implications will be more readily identifiable with experience if the provisions of the engrossed bill become law.

Department of Justice

Under the engrossed bill, a fourth offense OWI (all of which are misdemeanors under current law) would now be a Class H felony if the offender had at least one prior OWI violation within the previous five years of committing the fourth offense. Converting an estimated 65% of the OWI fourth offense caseload from misdemeanor offenses to felony offenses would create an estimated 1,236 OWI fourth offense felony convictions annually.

The engrossed bill would also provide that causing an injury while operating while intoxicated would be a Class H felony if the person had one or more prior OWI offenses. Based on 2007 DOT data, there were 119 convictions for a second OWI offense causing injury and 46 convictions for a third offense OWI causing injury. Assuming that none of these injuries involved the infliction of great bodily harm (which is already a Class F felony under current law), this provision of the engrossed bill could lead to an estimated 165 additional felony cases annually (as second and third OWI offenses are currently misdemeanor offenses).

While district attorneys are primarily responsible for prosecuting criminal and juvenile delinquency offenses at the trial or hearing level, the Department of Justice's Division of Legal Services generally represents the state in felony and other significant criminal and juvenile delinquency cases on appeal. The Department estimates that these law changes could lead to approximately 1,400 additional felony convictions annually. In the Department's experience, approximately one-third to one-half of OWI felony cases are appealed annually with the state being

represented by DOJ on these appeals. As a result, the Department estimates that these law changes could lead to an additional 462 to 700 criminal appeals cases annually. Department staff indicates that Criminal Appeals Unit attorneys, on average, handle approximately 60 cases annually. As a result, the Department estimates that it would require an additional 9.0 assistant attorneys general to process a possible increased felony appeal caseload of 540 cases annually.

The Department estimated the salary, fringe benefits, supplies, and equipment costs of these positions at $1,385,100 in the first year and $1,310,400 annually thereafter. It may be worth noting that the Department's estimate would fill these attorney positions at the hourly rate of $45, or an annual salary of $93,600. Typically, however, the Legislature when creating new positions provides resources at the minimum salary level, which for attorneys is currently $23.673/hour, or $49,400 annually. If these positions were filled at the minimum salary level, the first year cost of the positions would be $819,000, and the ongoing annual cost of the positions would be $744,300.

The Department further indicates that 9.0 additional assistant attorneys general would require 2.0 additional legal secretaries at a first year cost of $123,000, and an ongoing annual cost of $109,400.

In addition to costs associated with OWI felony appeals, the state crime laboratories also analyze blood samples submitted by local law enforcement agencies relating to felony OWI violations. To process an estimated 1,400 additional felony OWI blood samples annually, the Department indicates that it would need: (a) two additional gas-chromatography units totaling $140,000; and (b) 4.0 additional toxicology analysts at an annualized cost of $315,400. The Department estimates that even with these additional resources that the processing time for felony OWI blood samples will increase from two days to approximately three weeks.

District Attorney Surcharge

The engrossed bill would create a new $100 district attorney surcharge that would apply to convictions for: (a) operating while under the influence (including operating a commercial motor vehicle with an alcohol concentration of 0.04 or more but less than 0.08); (b) injuring another person while operating under the influence (including injuring another person while operating a commercial motor vehicle with an alcohol concentration of 0.04 or more but less than 0.08); (c) causing great bodily harm to another human being by the operation of a vehicle while under the influence of an intoxicant; and (d) homicide by intoxicated use of a vehicle. The surcharge revenue would be deposited to a new appropriation under the district attorney function to be used to prosecute intoxicated and drugged driving actions.

Based on DOT data, in 2007 there were 40,262 OWI-related convictions. Based on a review of collections under the driver improvement surcharge, it is estimated that approximately two-thirds of the amounts assessed under a new $100 district attorney surcharge could be collectable, or approximately $2.7 million annually. However, it should be noted that upon a criminal conviction (OWI second offenses and higher) state law specifies the order of payment for twenty state-created surcharges. Depending on where the district attorney surcharge is placed in the order of payment

for collection of surcharges in the criminal context, these anticipated collections could come at the expense of existing surcharge collections. In addition, in the civil context (OWI first offenses) available funds to pay surcharge obligations are generally prorated. Creating this surcharge could decrease the collections rate for other surcharges collected in the civil context, such as the penalty surcharge and the crime laboratories and drug law enforcement surcharge.

It appears that the revenue generated under a $100 district attorney surcharge would likely exceed the funding need identified by prosecutors to address increased workload and costs under the engrossed bill by approximately $2.1 million annually.

Court System

The Director of State Courts Office (DSCO) indicates that the following provisions in Engrossed AB 283 would likely impact state and/or county resources for the court system:

- Revising the various OWI offenses would increase judicial workload, since felony cases take longer to process than misdemeanor cases.

- Creation of a new district attorney surcharge would require software changes to the CCAP case management system, which would be addressed within the current budget.

Funding of the circuit court system is a shared state and county function: costs for circuit court judges and court reporters are directly supported by the state, with other court costs supported by counties from local and state revenue sources. According to the DSCO, a contested traffic case takes 7.5 minutes of judicial time, a misdemeanor case takes 47.6 minutes, and a felony case takes 162.8 minutes. Therefore, each case shifting from traffic to misdemeanor will require an additional 40.1 minutes of court time, and each case moving from misdemeanor to felony an additional 115.2 minutes.

With regard to making 4th OWI within five years of a previous OWI a felony, the DSCO states: "In 2008, the DOT reported there were 1,576 convictions for fourth offense OWI. DOT has estimated that 65% of those cases involve an offense within five years of a prior offense. Using that estimate, 1,024 cases would change from misdemeanors to felonies and more than 2,000 hours of judicial time would be required." Based on the average amount of time a judge has available for caseload, these cases would require approximately 1.6 new judgeships on a statewide basis.

Further, the DSCO indicates that making second or subsequent OWI causing injury a felony offense, would result in an additional 115.2 minutes for each additional case. It is not known, however, how many current OWI cases causing injury (the latest DOT data from 2002 indicates approximately 400 cases annually) may involve a second or subsequent OWI case. Therefore, the DSCO could not estimate the additional number of judgeships that may be necessary.

Regarding making first OWI with a minor in the vehicle a criminal offense, DOT data indicates that approximately 1.3% of first offense OWI offenses (approximately 300 cases in 2007)

may involve a minor in the vehicle under the age of 16. The DSCO states: "Based on the experience of several judges surveyed, it appears these cases are a small minority of the total first offense cases."

In addition to caseload growth as a result of increased penalties under Engrossed AB 283, the DSCO indicates that, with regard to ignition interlock devices:

> "There are unlikely to be any direct costs to the court system from the expanded use of ignition interlocks, except in one area. To the extent there is a significant increase in the number of vehicles with ignition interlocks installed, there is a greater likelihood that persons may be charged with tampering with or otherwise circumventing the use of the devices. Any increase in the number of these charges brought will result in increased court proceedings, all of which require greater judge, court reporter, court staff and juror time. These additional resources will be supplied by both the state and the county.
>
> A significant increase in vehicles with ignition interlocks will likely increase the workload of the Clerks of Circuit Court. Their offices monitor compliance with current ignition interlock orders, including collection of any monies due and dealing with license status issues with the Department of Transportation. In addition to the increased workload from these issues, clerks have indicated concern about whether their efforts to collect forfeitures, fines, surcharges and costs will be negatively affected by the additional financial burdens on defendants who will be required to pay for ignition interlocks. Their concerns are that payments may be delayed or never realized. Delayed or lower collections will affect revenues for the state, for counties and for the agencies who receive funds from the various surcharges. They also question whether counties may be required to pay for the portion of ignition interlocks that indigent defendants are unable to pay."

The DSCO did not identify specific funding amounts needed to implement Engrossed AB 283 because caseload figures are difficult to accurately determine. To the extent that cases that are currently misdemeanors become felony cases, costs to the court system will increase. Based on previous fiscal estimates, each new judgeship (a judge and a court reporter position) costs approximately $178,500 annually. However, it is not known in which counties any new judgeships would be necessary, and how overall current judicial caseload may shift over time. Further, administrative workload of the clerk of courts offices is likely to expand as the result of collection and monitoring of new ignition interlock devices. To the extent that the court system will need additional resources as a result of the provisions of Engrossed AB 283, therefore, resources could be requested during the 2011-13 budget process based on a statewide determination of overall judicial need.

Department of Corrections

To estimate the additional correctional costs associated with the provision of Engrossed AB 283, the Department of Corrections assumed that: (a) based on recent probation placements for fourth offense OWI, 31% of second and third offense OWI convictions would be placed on probation; (b) second and third offense OWI probation placements would be for one year; and (c) approximately 65% of fourth offense OWI convictions occur within five years of a third offense

OWI (based on 2008 DOT data). Further, since the average sentence lengths that judges will utilize in sentencing fourth offense OWI felonies is unknown, Corrections provided two independent cost estimates assuming: (a) sentences of 12 months in prison and three years on extended supervision to 31% of fourth offense felony offenders; and (b) sentences of 24 months in prison and three years on extended supervision to 50% of felony fourth offense offenders.

Based on the above, and assuming 14,580 OWI cases for second (9,196), third (4,114), and felony fourth offense (1,270), the Department estimated annualized populations of: (a) 391 sentenced to prison and 5,275 placed in the community on probation or on extended supervision if 31% of felony fourth offense OWI offenders are sentenced to 12 months in prison; or (b) 1,270 sentenced to prison and 6,006 placed in the community on probation or on extended supervision if 50% of felony fourth offense OWI offenders are sentenced to 24 months in prison.

Given Corrections' assumed average sentence lengths under the two scenarios, the Department indicates that the full impact to the correctional system of Engrossed AB 283 would occur over approximately one to two years for the state's prison system, and over four to five years for the community corrections (probation and extended supervision) system. Costs to Corrections would grow over this time as populations increased. Corrections estimates that the prison and community corrections costs in the first full year of implementation would be between $16.4 million and $22.3 million depending on whether 31% or 50% of fourth offense OWI offenders were sent to prison and whether state institutions or contract prison beds are utilized for incarceration. During the second full year, costs are estimated to range from $26.6 million to $50.6 million. Actual costs of the OWI modifications would depend on a number of factors, including when the change in penalties becomes effective, sentencing practices of judges for the new felony offenses, and any deterrent effect of the modifications. The Department's estimate also assumes that if contract beds are utilized, existing correctional facilities will need to be adapted and staffed for increased alcohol and other drug abuse treatment.

Further, based on the assumed sentence lengths, Corrections estimates that the modifications under Engrossed AB 283 will result in an annualized total of between 391 and 1,270 additional prisoners and between 5,275 and 6,006 additional probationers and persons on extended supervision. The Department projects that the annualized increased costs associated with housing and supervising the estimated increased populations to range from $31.2 million to $68.4 million, depending on the percentage of offenders sentenced to prison and whether the offenders would be placed in one of the state institutions or placed in prison contract beds. (Annualized populations and costs represent estimated figures after the applicable growth period.) The following tables detail the Department's annualized cost estimates under the assumptions the Department of Corrections identified: Table 1 identifies the costs assuming that 31% of felony fourth offense OWI offenders are placed in prison for 12 months; and Table 2 identifies the costs assuming that 50% of these same offenders are placed in prison for 24 months.

TABLE 1

Estimated Correctional Costs Under Engrossed AB 283, Assuming 31% of Felony Fourth Offense OWI Placed in Prison for 12 Months

	Annualized Costs	
	Prisons	Contract Beds
Prison	$13,887,700	
Contract Beds		$7,349,500
Additional Prison Staffing for AODA Treatment		3,363,100
Community Supervision	13,712,400	13,712,400
Enhanced AODA Supervision	6,754,700	6,754,700
Total	$34,354,800	$31,179,700
Additional Corrections Positions		
Correctional Facilities	70.00	44.00
Community Corrections	207.75	207.75
Total	277.75	251.75
Estimated Increased Population		
Prisons	391	
Community Corrections	5,275	

TABLE 2

Estimated Correctional Costs Under Engrossed AB 283, Assuming 50% of Felony Fourth Offense OWI Placed in Prison for 24 Months

	Annualized Costs	
	Prisons	Contract Beds
Prison	$45,075,300	
Contract Beds		$23,854,300
Additional Prison Staffing for AODA Treatment		10,924,600
Community Supervision	15,613,100	15,613,100
Enhanced AODA Supervision	7,701,800	7,701,800
Total	$68,390,200	$58,093,800
Additional Corrections Positions		
Correctional Facilities	260.00	143.00
Community Corrections	241.75	241.75
Total	501.75	384.75
Estimated Increased Population		
Prisons	1,270	
Community Corrections	6,006	

Included within the community supervision and enhanced AODA supervision items in both Table 1 and Table 2, are the costs of extended supervision (post incarceration community supervision) for offenders admitted to prison. On an annualized basis, these costs are estimated to range from $4,563,000 (with 47.25 positions) to $7,410,800 (with 81.25 positions). These extended supervision costs would occur whether prison or contract beds were used. Corrections estimates that making fourth offense OWI a felony offense will, on an annualized basis, cost between $18.4 million (with 117.25 positions) and $52.5 million (with 341.25 positions) if prison space is used, or between $15.3 million (with 91.25 positions) and $42.2 million (with 224.25 positions) if contract beds are used.

In considering the cost estimates, it should be noted that Corrections did not include costs of building any new correctional institutions. However, with the estimated increases in prison inmates, and given that the Department's institutions are already operating at or over capacity, it is unlikely that the Department could manage the increased admissions utilizing existing facilities. Generally, it takes at least three years to construct prison facilities once a determination has been made that a facility is necessary. Also, it should be noted that if the Department were to instead utilize prison contract beds, it would likely need to issue a request for proposals from private vendors for placement of the increased population, since the Department no longer contracts for out-of-state prison beds, or seek additional county jail bed space. In addition, the Department's estimate is based on the 2008-09 average daily costs and staffing at the Drug Abuse Correctional Center and the average daily cost for community supervision, but does not include individually targeted alcohol and other drug abuse treatment costs in the community. Finally, Corrections assumes that the Department will be responsible for electronic and sobriety monitoring equipment.

The Department's fiscal estimate does not make any assumptions related to sentencing changes recently enacted in 2009 Act 28. The sentencing provisions, that could affect costs in Corrections include: (a) positive adjustment time, allowing for the reduction of an inmate's prison sentence and a corresponding increase in extended supervision, based on the inmate's behavior in prison; (b) risk reduction sentence, allowing judges, at sentencing, to make offenders eligible for a reduction in their prison sentence based on completion of prescribed prison treatment programs; (c) bifurcated sentencing modifications, allowing Corrections to release certain offenders from prison who are within 12 months of release from prison (extended supervision is increased by a corresponding amount); (d) the earned release program and challenge incarceration programs, current law programs allowing judges to make an offender eligible for release from prison at an earlier time based on completion of prescribed programming; (e) discharge from extended supervision, allowing Corrections to discharge a person from extended supervision after he or she has served two years of extended supervision, if the person has met the conditions of extended supervision and the reduction is in the interests of justice; and (f) probation modification, allowing the Department to modify a person's period of probation and discharge the person from probation if the person has completed 50% of his or her period of probation. It is not known to what extent any of these sentencing provisions would be utilized by the courts or Corrections. However, to the extent that these sentencing modification provisions are used, Corrections prison and community corrections populations may be reduced.

Engrossed AB 283, creates a program revenue appropriation in the Department of Corrections for services for community corrections funded from the beer tax and liquor tax. The appropriation would be used to pay for alcohol and other drug abuse services in the state corrections system for persons convicted of intoxicated driving.

Under current law, an occupational tax is imposed by the state on the sale of beer at a rate of \$2 per 31-gallon barrel, or approximately 6.5¢ per gallon. The tax is paid by brewers, bottlers, and wholesalers on a monthly basis, and deposited into the general fund. The beer tax generated \$9.9 million in 2008-09, and is estimated to generate \$10.0 million in 2009-10 and 2010-11.

Under current law, the state imposes an occupational tax on the sale of liquor, wine, and fermented cider at the rates identified in Table 3.

TABLE 3

Liquor, Wine, and Cider Tax Rates

Beverage	Tax Rate Per Liter	Tax Rate Per Gallon
Liquor	85.86¢	\$3.25
Wine		
Up to 14% Alcohol	6.605	0.25
14% to 21% Alcohol	11.89	0.45
Cider	1.71	0.06

Liquor, wine, and cider taxes are due on a monthly basis and collected through payments by distributors and out-of-state direct shippers based on the actual tax liability for the previous month. These taxes, which are also deposited into the general fund, generated \$44.1 million in 2008-09, and are estimated to generate \$45.8 million in 2009-10 and \$47.6 million in 2010-11.

Under Engrossed AB 283, the first \$10 million collected in each fiscal year under the beer tax and the first \$10 million collected in each fiscal year under the tax on liquor, wine, and fermented cider would be deposited to the new PR appropriation in Corrections. This provision would take effect on July 1, 2011. The provision would have no fiscal effect in the 2009-11 biennium; however, the provision would reduce GPR tax collections by an estimated \$20 million, annually, beginning in 2011-12. Instead, this \$20 million would be deposited in the Department of Corrections' appropriation and used for the programs identified above. Funding from the appropriation would partially support costs identified in the Department's fiscal estimate.

Summary

Table 4 summarizes the annualized state costs associated with Engrossed AB 283 as

identified by state agencies. Over time it is anticipated that state costs would be higher than the figures reflected in the table, as newly created state positions are generally filled at the minimum salary for the position classification type. Table 4 does not reflect increased county costs that could be associated with increased county district attorney office costs, increased county court costs, and increased indigent counsel appointments. Possible county jail bed savings are also not captured in the table.

TABLE 4

Annualized State Costs Associated with Engrossed AB 283

Agency	Funding
Corrections*	$68,390,200
District Attorneys**	543,400
Public Defender	232,500
Justice	1,735,200
Total	$70,901,300

*Corrections costs assume that inmates would be housed in state prisons. Corrections costs could be reduced to $31,179,700 annually if contract beds were utilized, and it is assumed that 31%, rather than 50%, of felony fourth offenders are sentenced to prison. Under Engrossed AB 283, costs would be partially funded by $20 million annually provided from the beer and liquor taxes.

**Under Engrossed AB 283, costs would be offset by $2.7 million in annual revenue generated from the new district attorney fee.

We hope this information is of assistance.

JD/CC/PO/JR/sas

Wisconsin Counties Association

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MEMORANDUM

TO: Honorable Members of the Wisconsin State Legislature

FROM: Sarah Diedrick-Kasdorf, Senior Legislative Associate SDK

DATE: October 15, 2009

SUBJECT: Proposed Legislation Relating to the State's Operating While Intoxicated Laws

During this fall floor session, action to revise Wisconsin's operating while intoxicated laws has been taken by the full Assembly and the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing. Significant attention has been paid to this issue by the Wisconsin State Legislature and the media following numerous tragic accidents involving the use of drugs and alcohol. The Wisconsin Counties Association applauds the Legislature for examining our laws and recommending changes aimed at curbing the misuse of alcohol in this state. As you continue your deliberations on OWI legislation, we ask that you take into consideration the concerns of county government.

Much of the work agreed to by the Legislature to date involves increasing the punishment for OWI offenses. But in order to decrease drunk driving in the state of Wisconsin, our association believes a strong treatment component must be part of any legislative package moving forward. We support the expansion of the Winnebago County Safe Streets Program statewide but know more can be done.

The purpose of this memo is to share our concerns regarding the increased costs to counties contained in Assembly Bill 283 / Senate Bill 66. Items in the legislation that will increase county jail costs include the following:

Offense	Current Law	Assembly Bill 283	Senate Bill 66
First Offense OWI (with minor passenger in vehicle)	Civil offense - $300 - $600 forfeiture; forfeiture doubles with minor passenger in vehicle.	Criminal misdemeanor - $350 - $1,100 fine; 5 days to 6 months imprisonment.	Criminal misdemeanor - $350 - $1,100 fine; 5 days to 6 months imprisonment.
Third Offense OWI	Fine of $600 - $2,000; 30 days to 1 year imprisonment.	Fine of $600 - $2,000; 30 days to 1 year imprisonment.	Increases minimum term of imprisonment to 45 days.
Fourth Offense OWI	Fine of $600 - $2,000; 60 days to 1 year imprisonment.	If previous offense within 5 years: $600 - $10,000 fine; 6 months to 6 years imprisonment).	If previous offense within 5 years: $600 - $10,000 fine; 6 months to 6 years imprisonment).

Senate Bill 66 also eliminates a sheriff's discretion to manage his/her jail population by prohibiting house arrest for 4th or subsequent OWI offenders.

In addition, the Senate bill also modifies the Safe Streets Treatment Option Program by increasing the minimum sentence for a 3rd offense participant from 10 days to 14 days. The bill makes the Safe Streets program available to 4th offense OWI offenders who serve a minimum sentence of 29 days.

County Cost Estimates

The fiscal notes associated with the bills mention only that local jail costs could increase. The lack of specificity downplays the fiscal effect on counties statewide. WCA requests that the state develop fiscal estimates that reflect local county costs before legislative action is completed. For example, under Senate Bill 66 the mandatory minimum sentence for third offense OWI convictions increases from 30 to 45 days. In CY 2007, there were 4,114 convictions for 3rd offense OWI. Multiplying the 4,114 convictions times the additional fifteen days equates to an increase of 61,710 jail bed days annually. Utilizing $51.46 as the average cost of a jail bed day (amount DOC pays counties for contract beds), the total cost to counties of this single provision is $3,175,597 annually. This is one of several provisions that may significantly affect counties; it underscores the need for accurate fiscal estimates of these additional costs.

County Budget Crisis – Levy draws; Budget Cuts

Counties are currently in the process of finalizing their budgets for 2010. Due to reductions in state aid in the 2009-2011 state biennial budget (especially in the area of human services), decreased sales tax revenues, increased delinquencies, etc., many tough decisions are being made across the state in courthouses everywhere with regard to the provision of services.

Historically, the biggest draws on the county levy are health and human services programs and county jails. If the state does not allocate revenue to cover increased county costs associated with OWI statutory changes, counties will be forced to reallocate limited tax levy dollars from critical human services programs to their county jails, an outcome we hope to avoid.

Funding in Proposed Legislation

For the most part, these bills provide no funding for the increased costs counties will incur as a result of increased penalties (jail bed days). In addition, no funding is allocated to counties to fund treatment and prevention programming (Safe Streets, alcohol and drug courts, etc.). The bills do provide at least some funding sources for the state's increased costs.

Senate Bill 66 increases revenue to fund state costs associated with modifications to the state's operating while intoxicated laws. SB 66 increases the tax on hard liquor by 50 cents per liter, which generates an estimated $8.2 million in FY 10 and $25.7 million in FY 11.

The bill also increases the $20 surcharge paid by individuals convicted of any crime by $143 and deposits the increase in the state's general fund. The increased surcharge is estimated to generate $2.5 million in FY 10 and $10 million in FY 11.

Assembly Bill 283 deposits the first $10 million collected each fiscal year from the beer and liquor tax into a newly-created PR appropriation in the Department of Corrections for probation and various treatment services related to OWI offenders.

AB 283 also levies a $100 district attorney surcharge on all OWI convictions, including operating a commercial motor vehicle with a blood alcohol level between .04 and .08. Revenue received from the surcharge is transmitted to the Department of Administration to fund OWI prosecutions. The district attorney surcharge is estimated to raise $2.7 million annually.

Both the Senate and Assembly bills impose an ignition interlock device (IID) surcharge. AB 283 requires all offenders for which an IID is ordered to pay a $50 IID surcharge, $40 of which is paid to the sheriff, $10 is paid to the Department of Transportation. The IID surcharge is estimated to raise $0.2 million annually for the Department of Transportation. SB 66 allows counties to retain the $50 IID surcharge.

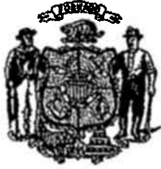
Senate Bill 66 increases the Joint Committee on Finance's supplemental appropriation by $26.6 million in FY11. The Department of Administration is required to submit a request under s. 13.10 on behalf of the district attorneys, Department of Corrections, Department of Justice and the Office of the State Public Defender on the allocation of the $26.6 million.

Recommendations

To ensure county costs are covered under the proposed legislation, the Wisconsin Counties Association recommends the following:

- SB 66 / AB 283 be referred to the Joint Finance Committee for action by the full committee. We ask the Joint Finance Committee to develop a funding source to cover local government costs associated with OWI law changes.
- In FY 11, the liquor tax increase contained in SB 66 is estimated to raise $25.7 million and the criminal action fee is estimated to raise $10 million. The JCF's supplemental allocation is increased by only $26.6 million. WCA requests the additional $9.1 million be allocated to counties to fund increased jail costs, as well as alcohol and drug treatment programs.
- The language in AB 287 (beer tax) be incorporated in the OWI bills to fund alcohol treatment programs statewide.
- An exemption to the levy limits be created for county jail costs to avoid the diversion of levy dollars from critical human services programs to county jails.

Thank you for your consideration of this important matter. Please do not hesitate to contact the WCA office if you have any questions.



Legislative Fiscal Bureau
One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

October 6, 2009

TO: Senators Decker, Sullivan, and Taylor

FROM: Jon Dyck and Jere Bauer

SUBJECT: Comparison of Provisions of Engrossed AB 283 and LRB s0141/1, Relating to the State's Operating While Intoxicated Laws

At your request, the attachment to this memorandum provides a comparison of the provisions of Engrossed AB 283 and LRB s0141/1 (substitute amendment to Senate Bill 66).

JD/JR/sas
Attachment

ATTACHMENT

OWI Proposed Changes to Current Law

Fines and Jail Term

	Current Law	Engrossed AB 283	Proposal
First Offense OWI (with minor passenger).	$300 to $600 forfeiture (civil offense, forfeiture doubled for minor passenger).	$350 to $1,100 fine; 5 days and 6 months term of imprisonment (criminal misdemeanor offense).	Same as Engrossed AB 283.
Third Offense OWI	$600 to $2,000 fine; 30 days to 1 year term of imprisonment.	No change to current law.	Increase minimum term of imprisonment to 45 days.
Fourth Offense OWI.	$600 to $2,000 fine; 60 days to 1 year term of imprisonment (misdemeanor offense).	For offenders with a prior offense within previous five years: $600 to $10,000 fine; 6 months to six years term of imprisonment (Class H felony--3 years prison and 3 years of extended supervision). For all other 4th offense offenders: No change to current law.	Same as Engrossed AB 283.
OWI causing injury (basic OWI and commercial motor vehicle with BAC of 0.04 to 0.08)	$300 to $2,000 fine; 30 days to 1 year term of imprisonment (misdemeanor offense); fines and jail term doubled if there was a minor in the vehicle.	For persons with a prior OWI conviction(s): Up to $2,000 fine; up to 6 years term of imprisonment (Class H felony); fines and prison term doubled if there was a minor in the vehicle. For other offenders (no prior offense): Same as current law.	Same as Engrossed AB 283.
Absolute sobriety violation.	Forfeiture of $400.	For offenders where there was a minor in the vehicle: Fine of $400 (criminal misdemeanor). For other offenders: Same as current law.	Same as Engrossed AB 283.

Probation and General Sentencing Provisions

	Current Law	Engrossed AB 283	Proposal
Minimum confinement period for multiple OWI offenders; applicability of house arrest.	48-consecutive-hour period (for all criminal OWI offenses).	For 7th, 8th, and 9th offense: 3 years. For 10th offense: 4 years. All other offenders: No change to current law.	Same as Engrossed AB 283, plus period of confinement may not include house arrest for 4th or subsequent OWI offense.
Probation for OWI offenders.	Probation allowed for 4th offense OWI, not less than 6 months nor more than 2 years; probation not allowed for 2nd or 3rd offense.	Probation allowed for 2nd and 3rd offense, in addition to 4th offense OWI.	Same as Engrossed AB 283, but maximum probation for 4th offense increased to three years.
Pre-sentence release and stay of sentence execution for OWI offenders.	Pre-sentence release and stay of execution (up to 60 days) allowed for OWI offenders.	Pre-sentence release and stay of execution prohibited for 3rd and subsequent offense until the after the minimum period of confinement is served.	Same as Engrossed AB 283, except the phrase "until the after the minimum period of confinement is served" is eliminated to remove that exception; in addition, the provision is clarified to specify that it applies only for OWI convictions, not all criminal convictions of offenders with multiple prior OWI convictions.
Alternative sentencing options.	In Winnebago County, 2nd and 3rd OWI offenders who complete probationary period that includes alcohol and other drug treatment are eligible for alternative sentencing with reduced minimum and maximum terms.	Extends Winnebago sentencing option to any county with a program similar to the Winnebago program.	Same as Engrossed AB 283, but increases the minimum sentence for a 3rd offense participant from 10 days to 14 days; also would make sentencing option available for 4th OWI offenders, with a minimum sentence of 29 days for participants.

Ignition Interlock Device (IID) Provisions

	Current Law	Engrossed AB 283	Proposal
General provisions.	IID order allowed for 2nd or subsequent OWI offense and required (unless seizure or immobilization ordered instead) for a 2nd or subsequent offense committed within five years.	IID order mandatory for all repeat OWI offenses and for a first OWI offense with a blood alcohol level of 0.15 and above; seizure and immobilization options eliminated.	Same as Engrossed AB 283.
Time periods.	IID restriction ordered for not less than one year nor more than maximum license revocation period for the offense; time period begins when ordered.	Operating privilege restriction time period unchanged, but begins when first license is issued instead of when order is issued; time period for vehicle installation order is eliminated; judge may order vehicle installation immediately upon issuance of the order.	Modifies Engrossed AB 283 to specify that operating privilege restriction shall be equal to the period of revocation for first OWI offenders.
IID surcharge.	No provision.	All OWI offenders for which IID ordered must pay a $50 IID surcharge; $40 goes to sheriff and the rest goes to DOT.	Counties retain the $50 surcharge; surcharge is placed after current law surcharges in priority of collection.
Provisions for low income offenders.	All offenders liable for the full cost of installation and maintenance of the device.	Offenders with a household income at or below 150% of the poverty line pay 50% of the cost of installation and maintenance.	Same as Engrossed AB 283, except that DOT may not approve IID provider for business in the state if the provider does not agree to allow qualifying individuals to a payment structure equal to 50% of the full installation and maintenance cost for other offenders.
Occupational license provisions.	No provision.	No occupational license may be issued to a person subject to an IID order unless the person submits proof that IID surcharge has been paid and that IID has been installed on every vehicle owned or registered in whole or in part by the offender.	Same as Engrossed AB 283, except that exception is provided for a vehicle or vehicles excluded from the IID order by a judge for reasons of financial hardship.
Enforcement and penalty provisions.	Forfeiture of $150 to $600 for removing, disconnecting, tampering with, or otherwise circumventing the operation of an IID.	Adds failure to install an IID, as ordered, as a violation; imposes criminal fine of $150 to $600, six months imprisonment, or both for violation; IID order period extended by six months for violation.	Same as Engrossed AB 283.
Prohibited alcohol concentration.	0.08 prohibited alcohol concentration, 0.02 for person with three OWI offenses; no special provision for offenders subject to an IID order.	0.02 prohibited alcohol concentration for persons subject to an IID order.	Same as Engrossed AB 283.

Other Provisions

	Current Law	Engrossed AB 283	Proposal
District Attorney Surcharge.	No provision.	$100 district attorney surcharge levied for any OWI conviction, including operating a commercial motor vehicle with a blood alcohol level of between 0.04 and 0.08. Revenues transmitted to Department of Administration for OWI prosecutions.	No provision.
Revocation time periods.	License revocation period begins when ordered.	License revocation period is tolled while a person is imprisoned.	Period of license revocation is extended by the amount of the term of imprisonment.
Surcharges and other sanctions for OWI offenders with a blood alcohol level of between 0.08 and 0.10.	Penalty surcharges, including OWI driver improvement surcharge are not levied for first-time OWI convictions if the offender had a blood alcohol concentration of between 0.08 and 0.10; no alcohol assessment required for such offenders.	Eliminate special surcharge and alcohol assessment exemptions for these offenders.	Same as Engrossed AB 283.
Beer and liquor tax revenue.	Beer and liquor tax is deposited in the general fund.	First $10,000,000 collected from each tax in each fiscal year credited to a new PR appropriation in the Department of Corrections for probation and various treatment services related to OWI offenders.	No Department of Corrections appropriation and associated allocation of beer and liquor tax.
Liquor tax.	Liquor taxed at 85.86¢ per liter.	No provision.	Increase the tax on hard liquor by 50¢ per liter, to generate an estimated $8.2 million in 2009-10 and $25.7 million in 2010-11.
Criminal actions fee.	$20 surcharge paid by person convicted of any crime; 50% retained by county and 50% deposited in the general fund.	No provision.	Increase surcharge by $143 and deposit increase in the general fund; increase estimated general fund revenue by $2.5 million in 2009-10 and $10.0 million in 2010-11.
Appropriation for state costs.		Department of Transportation; PR appropriation created with the state share of proceeds from the IID surcharge, estimated at $0.2 million annually. District Attorneys: PR appropriation created with proceeds of the district attorney surcharge, estimated at $2.7 million annually. Department of Corrections: PR appropriation created with an allocation of $20.0 million of beer and liquor tax revenues, beginning in 2011-12. Department of Justice; No provision. Office of State Public Defender: No provision.	Department of Transportation: No provision. District Attorneys, Department of Corrections, Department of Justice, and Office of State Public Defender: Joint Committee on Finance supplemental appropriation increased by $26.6 million in 2010-11; DOA required to submit request under s. 13.10 on behalf of these agencies to allocate funding.