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**HB 2 DUI Diversion
Sectional Analysis Ver A**

"An Act establishing the driving while under the influence diversion program for eligible persons charged with driving while under the influence or refusal to submit to a chemical test; relating to judgment for restitution; relating to suspended imposition of sentence; relating to records kept by the Department of Administration; relating to operating a vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance; amending Rule 9, Alaska Rules of Administration, and Rule 39, Alaska Rules of Criminal Procedure; and providing for an effective date."

Section 1 amends AS 04.16.160(a) (Restriction on Purchasing Alcoholic Beverages) to include diversion program participants among those categories of persons prohibited from purchasing alcohol. This amendment provides consistency for probationers, parolees, and diversion program participants.

Section 2 amends AS 09.38.500(8) (Definition) to include any restitution ordered as part of AS 28.35.043's diversion program as "a judgment of restitution." This amendment provides consistency and ensures that restitution is treated uniformly.

Section 3 amends AS 12.55.039(b) (Surcharge) to permit the normally mandatory surcharge to be waived, deferred or suspended if the defendant is a DUI diversion program participant. This amendment is intended to provide equal access to the diversion program.

Section 4 amends AS 12.55.078(a) (Suspended Entry of Judgement) to provide that suspended impositions of sentence shall not be applied in a fashion inconsistent with the framework set out in AS 28.35.043 for the DUI diversion program. This amendment is intended to promote consistency in sentencing.

Section 5 amends AS 12.55.155(d) (Factors in Aggravation and Mitigation) by adding (21)(B), participation in AS 28.35.043's DUI diversion program as a factor the court may consider in determining whether to permit imposition of a sentence below AS 12.55.125's presumptive range. This amendment is intended to permit participation in the DUI diversion program to be a mitigating factor in sentencing,

Section 6 amends AS 12.61.010(a) (Rights of Crime Victims) by adding (16), which requires victims to be given notice under AS 28.35.043 of a hearing or petition for diversion, as well as the right to make a written or oral statement on the petition. This amendment is intended to work in harmony with AS 28.35.043(h), which provides that victims of property damage involved in the DUI have a right to be present and heard at any hearings on the petition for diversion. This amendment is further intended to provide victims with input into the offender's request for diversion, which is consistent with Alaska's Victim's Rights Act.

Section 7 amends AS 18.85.100(a) (Right to Representation, Services, and Facilities) by including DUI diversion program participants among those categories of persons with the right to counsel at public expense. This amendment is intended to harmonize DUI diversion program participation with the rights of counsel afforded to criminal defendants, juvenile delinquents, and parents of Children In Need of Aid (CINA).

Section 8 amends AS 28.15.151(a) (Records to be Kept by the Department) by requiring the Department of Motor Vehicles (DMV) to include every diversion agreement entered into by an individual under AS 28.35.043 in its file of that individual's driver license applications, driver's history, accident reports, and disqualifications. This amendment is intended to provide uniformity of DMV practice and to include DUI diversion agreements in the participant's DMV file.

Section 9 amends AS 38.35.030(b) (Abandonment, Reduction, or Impairment of Service of Pipeline) to include persons not completing the DUI diversion program as being subject to the mandatory minimum sentence for a first offense DUI and by expressly permitting persons who completed the program to be eligible for a suspended imposition of sentence. These amendments are intended to effectuate AS 28.35.043 and provide uniform sentencing procedures.

Section 10 amends AS 28.35.032(g) (Refusal to Submit to Chemical Test) (g)(A) is amended to add that a minimum sentence of imprisonment only applies if the person did not complete the driving while under the influence diversion program under AS 28.35.043.

(g)(2)(B) is amended by adding an exception to this subsection. The court may not impose a suspended imposition of sentence, 'except for a person who is a participant in the dui diversion program under AS 28.35.043.' This gives the court the ability to impose a suspended imposition of sentence.

Section 11 amends AS 28.35 by establishing AS 28.35.043, which creates a DUI diversion program within the Alaska Court System.

- AS 28.35.043(a) formally establishes a DUI diversion program in the Alaska Court System.
- AS 28.35.043(b) provides that, at the first court appearance for an individual charged with DUI under existing AS 28.35.030 or AS 28.35.032, the court shall advise the defendant that they may be eligible for participation in the DUI diversion program. It also establishes the criteria for participation in this program, which is intended to apply only to those individuals who are in court for the first time regarding a simple DUI. AS

28.35.043(b)'s criteria are set forth in (b)(1)-(8) and include no prior or pending DUI charges, no other pending criminal charges involved in the incident, no pending or (within 15 years) prior DUI diversion programs, not holding a CDL, nor driving commercial motor vehicles, at the time of the incident, and no assault or homicide charges involving the defendant's operation of a motor vehicle. AS 28.35.043(b)(1)-(8) are intended to limit the program to simple first DUI offenses.

- AS 28.35.043(c) requires any defendant eligible for the DUI diversion program to file a petition, together with a \$490 filing fee, and to request admission to the program, as well as requiring this petition be filed no more than 30 days after the defendant's first appearance before a judicial officer, unless the court allows an extension for a good reason. For the purposes of this subsection, it also provides that a defendant may not extend the deadlines by filing motions challenging the prosecution, moving the judicial proceedings forward, or file the petition after pleading guilty or no contest to the charge.
- AS 28.35.043(d) provides for a deadline for filing a petition of 14 days after the State provides lab results of any urine or blood testing to the defendant or the defendant's attorney under certain limited circumstances involving urine or blood testing.
- AS 28.35.043(e) requires the petition to be made using a form provided by the Alaska Court System and including a number of designated elements. These criteria require the defendant to (1) plead guilty or no contest to the DUI charge under AS 28.35.030 or AS 28.35.032; (2) provide a sworn statement that the defendant is eligible for the diversion program; (3) agree to complete a screening interview to determine the nature of any alcohol or substance abuse issue; (4) agree to follow treatment recommendations at the defendant's expense; and (5) agree to not consume intoxicating substances while participating in the program (with exceptions for proper use of medications and religious rites). Under AS 28.35.043(e)(6), the petition must notify the defendant that, if the defendant commits an offense under AS 28.35.029 (open container), AS 28.35.030 (DUI), or AS 28.35.032 while in the program, that occurrence is a violation of the program. The defendant must keep the court advised of the defendant's current mailing address throughout the program under (e)(7) and must further acknowledge that the defendant's failure to complete the program will result in further action being taken upon the DUI charge under (e)(8). Program participants must pay court-appointed attorney fees before completion under (e)(9), as well as any restitution required during the program pursuant to (e)(10).
- AS 28.35.043(f) permits installment payments for the filing fee required under (c) or may even waive all or part of that filing fee or court-appointed attorney fees if the defendant is indigent. This subsection is intended to help effectuate equal access to the diversion program.
- AS 28.35.043(g) permits the prosecution to object to the petition and request a hearing on that objection. This subsection safeguards the public's interest in providing input on eligibility for the diversion program, while also permitting the defendant an opportunity to be heard.
- AS 28.35.043(h) provides that victims of property damage involved in the DUI have a right to be present and heard at any hearings on the petition for diversion. This subsection is intended to provide victims with input into the offender's request for diversion, which is consistent with Alaska's Victim's Rights Act.
- AS 28.35.043(i) creates a framework for the court to determine whether to admit a defendant into the program. This framework includes consideration of (1) whether

diversion will benefit the defendant and the community; and (2) the defendant's indicia of amenability to the program's rules and the presence of minors during the offense. AS 28.35.043(i)(3) requires the court to deny the petition in certain circumstances, including (A) being charged or convicted for another DUI or refusal under AS 28.35.032; (B) failure to appear at the arraignment without good cause; (C) participation in another diversion program related to the DUI charge; (D) being charged with or convicted of an offense under AS 11.41.100 – 11.41.230 flowing from the operation of a motor vehicle; or (E) has a prior DUI conviction. AS 28.35.043(i)(4) prohibits the court from denying a petition due to the defendant's military service obligations and is consistent with existing Alaska law protecting service members from adverse actions based upon their service. (i)(5) states that the court may not deny the petition because the defendant has sought or entered into treatment that is not court ordered or because they participated in court ordered treatment in another case.

- AS 28.35.043(j) provides that the defendant's plea of guilty or no contest to DUI shall be accepted but not entered as a judgment of conviction pending the defendant's participation in the diversion program. This is intended to help effectuate AS 28.35.043(c)'s petition requirements, with the defendant waiving his rights to challenge the prosecution's evidence or to seek trial, but with the conviction not being entered unless the defendant fails to successfully complete the diversion program.

This subsection also provides that the diversion agreement lasts for one year after the petition under AS 28.35.043(c) is granted. This subsection further provides that the criminal case is stayed pending completion or termination of the diversion agreement. (The legislature should also provide for a corresponding stay of any Department of Motor Vehicles (DMV) administrative license revocation if the petitioner is accepted into the program since the DMV is equally inundated with license revocation actions.)

- AS 28.35.043(k) defines the signed and dated petition under AS 28.35.043(c) as the diversion agreement and provides that this agreement is part of the record. It also requires the court to notify the Department of Administration of the diversion agreement within 48 hours after granting the petition.
- AS 28.35.043(l) establishes that the criminal case shall proceed if the defendant's diversion petition under AS 28.35.043(c) is denied. This subsection provides that the petition's contents, including the defendant's plea of guilty or no contest may not be used during the prosecution or in any other proceeding arising out of the DUI. This subsection is intended to prohibit punishing an unsuccessful diversion petitioner and does not cover situations where the petition was granted but the defendant failed to complete the diversion program.
- AS 28.35.043(m) provides that defendants on active duty with the military may complete a comparable treatment program elsewhere to satisfy the treatment program requirement as part of the diversion agreement. This subsection is intended to permit active-duty military service members to complete the diversion program without their ability to do so being hampered by their service obligations.
- AS 28.35.043(n) provides that the court may order to attend a victim impact treatment session as part of the diversion agreement, including payment of fees to offset the costs.

- AS 28.35.043(o) provides for the defendant to request an extension of the diversion period within 30 days before it expires or at any time prior to the expiration date if the defendant is on active duty with the military. Failure to complete the program by the extended date is addressed in subsection (q).
- AS 28.35.043(p) provides that requests for an extension of the diversion period pursuant to subsection (o) may be granted if the defendant made a good faith effort to complete the program and that the defendant can complete the program within the time requested. This subsection sets forth limitations on the amount and duration of extensions that may be requested and includes additional accommodations for active-duty military.
- AS 28.35.043(q) provides that the diversion program will be completed by the end of any extended diversion period. If the defendant fails to complete the program by the extended deadline, then the court is required to enter the defendant's guilty or no contest plea required by AS 28.35.043(c) as a judgment of conviction and then sentence the defendant.
- AS 28.35.043(r) addresses the procedure following a court's denial of a request for extension of the diversion period made under subsection (e). It provides that if the court denies the request for extension, then the court is required to enter the defendant's guilty or no contest plea as a judgment of conviction and then sentence the defendant.
- AS 28.35.043(s) establishes a procedure for terminating the diversion agreement upon motion at any time prior to the successful completion of the diversion program. It provides that upon motion, the court may issue an order requiring the defendant to appear and show cause why the court should not terminate the diversion agreement. The order to show cause must notify the defendant why termination is being proposed and specify the amount of fees still owing and set an appearance date. If the amount owing is less than \$500, then the order to show cause must notify the defendant that the court may dismiss the DUI charge if the defendant successfully completes the conditions of the diversion agreement and pays all outstanding sums before the hearing date.
- AS 28.35.043(t) works in tandem with subsection (s), by providing that the diversion agreement will be terminated and the defendant's guilty or no contest plea required by AS 28.35.043(c) will be entered if the defendant fails to appear or if the court finds that the defendant either no longer qualifies for the program under subsection (b) or failed to fulfill the diversion agreement. This subsection further provides that the DUI will be dismissed with prejudice if the defendant complied with the diversion agreement. It further provides that any outstanding owed restitution will not result in the diversion agreement's termination if the defendant otherwise adhered to the diversion agreement.
- AS 28.35.043(u) works together with subsection (t) by providing that any time toward partial fulfillment of the diversion agreement may be considered by the court at sentencing.
- AS 28.35.043(v) provides the mechanism for successful program participants to obtain dismissal of the DUI with prejudice by filing a motion. (As indicated, it is submitted that successful participants should also be granted dismissal of their pending DMV action.)
- AS 28.35.043(w) works with subsection (v) by providing the court with an opportunity to dismiss the DUI with prejudice when the defendant fails to file a motion within six months after the end of the diversion period. Before the court can issue such an order, it must find that the defendant fully complied with the diversion agreement and must also enter a judgment for any remaining outstanding restitution balance.

- AS 28.35.043(x) works in conjunction with other subsections' accommodation for active-duty military by permitting telephonic appearance and, in certain cases, even staying termination of the diversion agreement.
- AS 28.35.043(y) provides that diversion program service providers shall provide the parties with information and reports regarding the defendant's assessments, treatment and progress. This subsection also provides that such information is confidential and limited to the defendant's compliance with the diversion program.
- Additionally, HB 2 adds AS 28.35.099, which provides uniform definitions for AS 28.35.029 – 28.35.099. These definitions are intended to provide uniformity in the interpretation of DUI-related statutes.

Section 12 amends AS 43.23.140(b)(2) (Exemption of and Levy on Permanent Fund Dividends) to include restitution awards under AS 28.35.043 among those debts not subject to exemptions for Alaska Permanent Fund Dividend garnishments or seizures. This amendment is intended to promote uniformity in restitution garnishments.

Section 13 amends AS 47.37.210(a) (Records of Alcoholics, Drug Abusers, and Intoxicated Persons) to maintain the confidentiality of registration and other records of treatment facilities except as required by AS 28.35.043(y) and AS 28.35.030(d). This amendment is intended to maintain patient confidentiality while allowing personnel in the DUI diversion program access to those records.

Section 14 repeals AS 28.35.039 (Definitions) and works with the enactment of AS 28.35.099, which provides uniform definitions for AS 28.35.029 – 28.35.099. These definitions are intended to provide uniformity in the interpretation of DUI-related statutes and repeal of AS 28.35.039 eliminates confusion that might otherwise arise.

Section 15 amends the uncodified law of the State of Alaska by specifying that AS 28.35.043 has the effect of changing Rule 39, Alaska Rules of Criminal Procedure and Rule 9, Alaska Rules of Administration. This language is necessary to comply with Alaska Supreme Court authority regarding the impact of legislation upon Alaska's Rules of Court.

Section 16 amends the uncodified law of the State of Alaska by requiring that the changes to Alaska's Rules of Court must be approved by a two-third majority vote of each house, as required by the Alaska Constitution.

Section 17 amends the uncodified law of the State of Alaska by permitting the Department of Administration to adopt regulations necessary to implement the changes made by this Act.

Section 18 provides that section 16 is immediately effective.

Section 19 provides that the Act itself takes effect July 1, 2024.