

**ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672**

**8344 SENATE JUDICIARY**

1 ordered as provided under this section. At the hearing, a person who claims an  
2 ownership or security interest in the motor vehicle, or aircraft, must establish by a  
3 preponderance of the evidence that

4 (1) the petitioner has an interest in the motor vehicle, or aircraft,  
5 acquired in good faith;

6 (2) a person other than the petitioner was convicted of the offense that  
7 resulted in the forfeiture; and

8 (3) before parting with the motor vehicle, or aircraft, the petitioner did  
9 not know or have reasonable cause to believe that it would be used in the commission  
10 of an offense.

11 \* Sec. 22. AS 28.35 is amended by adding a new section to article 2 to read:

12 Sec. 28.35.039. DEFINITION FOR AS 28.35.029 - 28.35.039. In  
13 AS 28.35.029 - 28.35.039, "controlled substance" has the meaning given in  
14 AS 28.33.190.

15 \* Sec. 23. AS 28.40.100(a) is amended by adding a new paragraph to read:

16 (24) "serious physical injury" has the meaning given in  
17 AS 11.81.900(b).

18 \* Sec. 24. AS 28.35.030(m)(1) and 28.35.037(d) are repealed.

19 \* Sec. 25. APPLICABILITY. The amendments made by secs. 1, 8, 9, 14, 16, and 19 of  
20 this Act apply to offenses that are committed on or after the effective date of this Act, except  
21 that references to previous convictions include convictions occurring before, on, or after the  
22 effective date of this Act.

23 \* Sec. 26. This Act takes effect July 1, 1994.

# FISCAL NOTE

STATE OF ALASKA  
1994 LEGISLATIVE SESSION

BILL NO: HB 445 AM

Revision Date: 04/26/94 Dept. Affected: Public Safety  
 Title: DWI Laws BRU: DPS Statewide Support  
 Component: Laboratory Services  
 Sponsor: BLS/GOVERNOR  
 Requester: (S) JUDICIARY COMPONENT SERIAL NO. 527

**EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)**

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	49.6	49.6	49.6	49.6	49.6	49.6
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>49.6</b>	<b>49.6</b>	<b>49.6</b>	<b>49.6</b>	<b>49.6</b>	<b>49.6</b>
<b>CAPITAL EXPENDITURES</b>						
<b>CHANGE IN REVENUES ( )</b>						
<small>Revenue Code</small>						

**FUNDING: (Thousands of Dollars)**

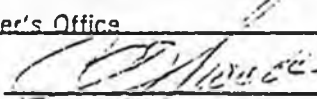
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other Interagency Receipts	49.6	49.6	49.6	49.6	49.6	49.6
<b>TOTAL</b>	<b>49.6</b>	<b>49.6</b>	<b>49.6</b>	<b>49.6</b>	<b>49.6</b>	<b>49.6</b>

Estimate of current year (FY 94) impact: \$ \_\_\_\_\_

**POSITIONS:**

FULL-TIME	1	1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)  
See attached analysis.

Prepared By: Lee Ann Lucas Phone: 465-1327  
 Division: Commissioner's Office Date: 04/26/94  
 Approved by Commissioner:  Date: 04/26/94  
 Agency: Richard L. Burton, Dept. of Public Safety

PREPARER TO PROVIDE ALL  
For further distri

Y'S LEGISLATIVE OFFICE  
ative Office

In 1992, 382 major injury crashes involving approximately 550 drivers and 39 fatal crashes involving approximately 125 drivers were reported statewide.

Implementation of this legislation will require chemical test or tests to be administered at the direction of a law enforcement officer who has reasonable grounds to believe that a person was operating or driving a motor vehicle or commercial vehicle involved in an accident that causes death or serious physical injury to another person, for the purpose of determining the presence of controlled substances in that person's blood and urine, even if the person is not under arrest.

The Scientific Crime Detection Laboratory oversees all breath instrument tests statewide. Approximately 6,000 DWI breath tests are conducted per year by city and state. Additionally, 250 blood tests are administered for the purpose of determining the alcohol content of the person's blood. It is estimated that approximately a total of 300 chemical tests will be administered statewide per year to detect the presence of alcohol and/or controlled substances in drivers of motor vehicles or commercial vehicles that are involved in accidents that cause death or serious physical injury to another person.

To perform this function, the Scientific Crime Detection Laboratory will require one additional scientist, a Criminalist I, who will be a trained Toxicologist. This employee will utilize a sophisticated Ion Trap Mass Spectrometer instrument to analyze urine and blood samples to determine the presence or the lack of the presence of alcohol and/or controlled substances. Other duties performed by this employee would include: instrumental identification of controlled substances; drug analysis of specimens from suspects in murder and assault cases; analyses of solid dosages of controlled substances; and other tasks associated with the Statewide Breath Alcohol Program such as instrument calibration and certification.

Currently, the Scientific Crime Detection Laboratory is not performing these toxicology analyses; they are sent out-of-state. To our knowledge, there are no laboratories in the State (other than this laboratory) equipped to do these analyses. Additionally, if court testimony is needed of the analyst, it is very costly to bring them up from the Lower 48 for court purposes.

It is anticipated that federal highway funds through the Highway Safety Planning Agency will be available to fund the initial three years of this

Department of Public Safety  
DWI Laws  
HB 445 AM  
Page 3 of 4

position. Contingent upon the success of the program and review by the regional administrator, federal highway funds may be available to continue this position beyond the initial three-year period.

PERSONAL SERVICES

Salary - Criminalist I, Range 15, Step A	\$34,260	
Benefits	15,321	
	<hr/>	
Total Personal Services		\$49,581

POSITION INFORMATION HAS BEEN UPDATED AND FUNDING HAS BEEN UPDATED.

12/30/93

Position Information Inquiry/Update

07:58:10

Position: 12-12#091	Project: 0	Salary Costs: 34,250.
Component: 12-62-06-02-01-10		Benefits Costs: 15,321.00
Scenario: 3      FY: 95	COLA % = 0.00	Total Costs: 49,571.07

-----  
 Actuals not available      (Status: UNKNOWN )      Retirement Code: A  
 -----

\* Step: A for 12.0 months & Step: B for 0.0 months (total: 12.00 )  
 00/00/00 \* Merit Data; use merit defaults? N      ( 0.0 @      & 0.0 @ )  
 0 \* Class/Sched Prefix: 1      Schedule: 1A (actual: )  
 \* Bargaining Unit: GG      Range: 15 (actual: )  
 \* Location Code: EBA      Place: ANCHORAGE  
 \* Job Class Code: P8371      Title: CRIMINALIST I \_\_\_\_\_  
 \* Seasonal Indic.: F      Type: -

Optional Override Salary Rates:

Monthly Rate: 0.00 \_\_\_\_\_ for 0.0 months & rate of 0.00 \_\_\_\_\_ for 0.0 months  
 Hourly Rate: 0.00 \_\_\_\_\_ for 0.0 months      Frozen at this rate? (Y/N): N

Press ENTER to update record; enter # or use PF key to go to another screen:  
 1=Premium pay info      2=Funding info      4=Code Translations      6=Calculations  
 7=MISC NEW POS DATA      8=Detail Report      12=Exit w/o update      Selection: 0\_

320      Aa      aAa06 FX

Revision Date: \_\_\_\_\_  
Title: "An Act relating to driving a motor vehicle ..."  
Sponsor: Rules/Bv Request of the Governor  
Requestor: Governor's Office

Department Affected: Department of Law  
BRU: Prosecution  
Component: All  
COMPONENT SERIAL NO. 0085 through 0090

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
POSITIONS:						
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Pegues, Director  
Division: Administrative Services Division  
Approved by Commissioner: Bruce M. Botelho, Attorney General  
Agency: Department of Law

Phone: 465-3672  
Date: January 25, 1994  
Date: January 25, 1994

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1994 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_  
 Title: Relating to operating a motor vehicle  
 Sponsor: Rules Committee  
 Requestor: Governor

Department Affected: Administration  
 BRU: Public Defender Agency  
 Component: Public Defender Agency  
 COMPONENT SERIAL NO. 3510

EXPENDITURES/REVENUES:

(Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUNDING SOURCE:

(Thousands of Dollars)

002 Federal Receipts	0	0	0	0	0	0
003 GF Match	0	0	0	0	0	0
004 GF	0	0	0	0	0	0
005 GF/Program Receipts	0	0	0	0	0	0
006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY 94) cost: \$

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: John B. Salem, Public Defender  
 Division: Public Defender Agency

Phone: 264-1400  
 Date: \_\_\_\_\_

Approved by Commissioner: Nancy Bear Ustera, Commissioner  
 Agency: Department of Administration

Date: \_\_\_\_\_

FISCAL NOTE

NO. 1  
 Bill Version: HB 445  
 (H) Publish Date: 2/4/94

STATE OF ALASKA  
 1994 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_  
 Title: Relating to operating a motor vehicle  
 Sponsor: Rules Committee  
 Requestor: Governor

Department Affected: Administration  
 BRU: Office of Public Advocacy  
 Component: Office of Public Advocacy  
 COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ( )	0	0	0	0	0	0
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FUNDING SOURCE: (Thousands of Dollars)

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
002 Federal Receipts	0	0	0	0	0	0
003 GF Match	0	0	0	0	0	0
004 GF	0	0	0	0	0	0
005 GF/Program Receipts	0	0	0	0	0	0
006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 94) cost: \$ 0

POSITIONS:

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Brant McGee, Director  
 Division: Office of Public Advocacy

Phone: 274.1684  
 Date: \_\_\_\_\_

Approved by Commissioner: Nancy Bear Usher  
 Agency: Administration

Date: \_\_\_\_\_

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GOVERNOR



P. O. Box 110001  
Juneau, Alaska 99811-0001  
(907) 465-3500

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

February 4, 1994

*The Honorable Ramona L. Barnes  
Speaker of the House  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1182*

*Dear Speaker Barnes:*

*Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to operating or driving a motor vehicle, commercial motor vehicle, aircraft, or watercraft.*

*Sections 5, 7, 12, and 13 of the bill contain the main objective of the bill. Those sections contain provisions relating to implied consent for, and administration of, chemical tests to detect the presence of drugs in drivers of motor vehicles or commercial vehicles that are involved in accidents that cause death or serious physical injury to another person.*

*The use of drugs by motor vehicle drivers, both alone and in combination with alcohol, is a major traffic safety concern. The apprehension and successful prosecution of the drug-impaired driver has been and remains a major concern of law enforcement.*

*The state's implied consent law is contained in existing AS 28.35.031 and, for commercial motor vehicle drivers, in AS 28.33.031. These sections provide that a vehicle driver who is under arrest for driving while intoxicated is considered to have given "consent" to a chemical breath test to determine the amount of alcohol in the person's blood or breath. Existing AS 28.35.032 authorizes law enforcement officers to request that an arrested driver submit to that chemical breath testing.*

*Sections 5 and 7 of the bill amend the implied consent statutes (AS 28.33.031 and AS 28.35.031) to specify that a person who operates a motor vehicle or commercial*

**GOVERNOR'S TRANSMITTAL  
LETTER**

The Honorable Ramona Barnes  
February 4, 1994  
Page 2

motor vehicle in this state is considered to have given consent to submit to a chemical test to determine the presence of both alcohol and drugs if the person is involved in an accident that causes death or serious physical injury to another person, even if the person is not under arrest. A specific definition for "serious physical injury" is provided in sec. 16 of the bill. Driving is a privilege granted by the state that can be conditioned upon consent to reasonable terms, such as consent to the chemical tests enumerated in AS 28.33.031 and AS 28.35.031 as amended by the bill.

Under existing AS 28.35.032(a), a person can refuse to submit to a chemical breath test; existing AS 28.35.032(f) makes the refusal a misdemeanor offense. Section 8 of the bill amends AS 28.35.032(a) to add references to the chemical tests provided for in secs. 5 and 7 of the bill; sec. 10 of the bill amends AS 28.35.032(f) in the same way. Several "housekeeping" amendments to AS 28.35.032(a) are also made by sec. 8 of the bill.

Under AS 28.35.032(a) and 28.35.035, if a person has been notified of the penalties that will result from refusal to submit to a chemical breath test, and the person then refuses to submit, the test may not be given unless the person has been arrested and the arrest resulted from an accident that causes death or physical injury to another person. This bill does not change those provisions other than to add references to the additional chemical tests provided for in secs. 5 and 7 of the bill. See secs. 8, 12, and 13 of the bill.

Sections 1 - 4, 9, 11, and 14 of the bill make additional conforming amendments to statutes in AS 28 to refer to the chemical tests provided for in secs. 5 and 7 of the bill. The amendment to AS 28.33.190 in sec. 6 of the bill is generally to provide a definition for "controlled substance" in AS 28.33. That term is used in AS 28.33.031(a) as that statute is amended by sec. 5 of the bill. Additionally, the amendment to AS 28.33.190 will provide other needed definitions for AS 28.33.010 - 28.33.031. The existing language of AS 28.33.190 unnecessarily excludes those sections.

The amendments made by secs. 15 and 17 of the bill are to provide a definition of "controlled substance" for AS 28.35.029 - 28.35.039. The existing definition, which is specific to only AS 28.35.030, is repealed and is replaced by the same definition located in a general definition section for AS 28.35.029 - 28.35.039.

In my State of the State address on January 12, 1993, I identified "alcoholism, along with the abuse of other drugs," as "Alaska's number one health problem." I reiterated my commitment to dealing with this issue in my State of the State address this year, as well. This proposed legislation gives police and prosecutors the tools they need to

*The Honorable Ramona Barnes*

*February 4, 1994*

*Page 3*

*combat the significant highway safety problem presented by those drivers who use drugs and then cause fatal or serious injury accidents.*

*I urge your favorable action on this bill.*

*Sincerely,*

A handwritten signature in cursive script, reading "Walter J. Hickel". The signature is written in dark ink and is positioned above the printed name and title.

*Walter J. Hickel*  
Governor

DEPARTMENT OF PUBLIC SAFETY

OFFICE OF THE COMMISSIONER

Richard L. Burton  
Commissioner  
P.O. BOX 111200  
JUNEAU, ALASKA 99811-1200  
PHONE: (907) 465-4322  
FAX: (907) 465-4362

February 16, 1994

DRUGS IN SERIOUS INJURY AND FATAL ACCIDENTS

FACT SHEET

1. Very few studies have been conducted of drug use by drivers involved in crashes. What limited data is available has focused on limited geographic areas and special driver populations such as young males.
2. In 1988, the National Highway Transportation Administration synthesized existing research in a report to Congress and found that drugs were present in 10-22 percent of crash involved drivers.
3. Los Angeles Police Department personnel estimate that 20 percent of persons arrested for impaired driving were under the influence of drugs. In addition, when drugs were found in either crash involved or arrested drivers, they were found most often in combination with alcohol.
4. Urine is generally the best specimen to screen for the presence of a drug, but blood is necessary if you wish to know the degree of influence of the drug as well as possible dose and time of administration.
5. If you want to know if a suspect was under the influence of a drug at the time of committing an offense, a blood and urine sample should be collected as close to the time of the offense as possible.
6. In one study blood specimens were obtained from nearly 2,000 fatally injured drivers from seven states. Drugs other than alcohol were present in approximately 18 percent of these drivers.
7. A second recent study which was a far more comprehensive which focused on fatally injured drivers who died within four hours of the crash. Blood specimens were collected from a sample of 1,882 fatally injured drivers from 13 sampling sites, encompassing three entire states (Massachusetts, North Carolina, and Wisconsin), and selected counties in California, Nevada, Texas and Virginia. The results of the tests are as follows:
  - a. Alcohol was found in 52 percent of fatalities.

- c. 64 percent of drug cases also had alcohol.
  - d. A drug was detected without alcohol in 6.3 percent of fatalities.
  - e. Abuse drugs (e.g., marijuana, cocaine) were found most frequently in the 25-54 age group.
  - f. Marijuana and cocaine were found more frequently in urban crashes than in rural ones.
  - g. Prescription drugs were found most frequently in the over 55 age group.
  - h. Drugs were found mostly in males.
  - i. Regional difference: Amphetamines were found nearly exclusively in California; Marijuana/cocaine were unusually prevalent in Dallas, TX; and Wisconsin had the lowest abuse drug involvement.
8. With a urine sample, the lab is able to screen for a wide range of all types of controlled substances in detail very cheaply. Then the lab is able to go back after identifying the controlled substance in the urine and quantify the amount through the blood test. If blood alone is submitted it is a very cumbersome, slow expensive process to attempt to identify multiple substances or in essence screen the blood.
9. The following substances are usually checked during a routine urine screen.
- A. Stimulants
    - 1. Amphetamines
    - 2. methamphetamine
    - 3. "MDA"
    - 4. Dexedrine
  - B. Depressants
    - 1. Barbiturates
    - 2. Seconal
    - 3. Nembutal
  - C. Tranquilizers
    - 1. Valium
    - 2. Librium
  - D. Opiates
    - 1. Morphine
    - 2. Percodan
    - 3. Heroin
    - 4. Dilaudid
  - E. Antidepressants
    - 1. Elavil

F. Marijuana

G. Cocaine

H. LSD

*Lorn M. Campbell*

Lorn M. Campbell (Name of Submitter)

HSP4 (Agency)

465-1374 (Phone Number)

Richard L. Burton  
Commissioner

DEPARTMENT OF PUBLIC SAFETY

OFFICE OF THE COMMISSIONER

P.O. BOX 111200  
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Mandatory Drug/Alcohol Testing  
Discussion Paper

"A bill to provide for implied consent for, and administration of, chemical test to detect the presence of drugs in drivers of motor vehicles or commercial vehicles that are involved in accidents that cause death or serious physical injury to another person".

This proposed legislation gives law enforcement officers additional tools they need to combat the significant highway safety challenge presented by those drivers who use drugs and then cause fatal or serious injury accidents.

Discussion:

Much deserved attention has been focused on drunk driving, while the related dangers presented by individuals driving under the influence of drugs other than alcohol or taken in conjunction with alcohol or other drugs have had little attention. One of the reasons for the lack of attention has been a lack of legislation allowing for the taking of blood and urine samples in those cases where drug use may be suspected.

The impact of intentional or unintentional drug abuse on motor vehicle operation in our highly mobile society is enormous as there currently are obtainable over 20,000 prescription drugs; 100,000 over-the-counter drugs; 500 illicit drugs; and 200 herbal drugs.

Drug use has become prevalent in our society. An estimated twenty-three million people are marijuana users, at least five million people use cocaine, and even a greater number use psychoactive prescription and over-the-counter medication.

There are unique subcategories of drivers whose apparent drug use patterns differ from those of the general driving population. For example, commercial truck drivers exhibit a substantially lower alcohol-involvement crash rate than do passenger vehicle drivers. In 1985, five percent of the drivers of heavy trucks involved in fatal crashes had been drinking whereas thirty-four percent of the drivers of passenger vehicles involved in fatal crashes had consumed alcohol. However, truck drivers were found to have been more apt to use stimulants.

The National Transportation Safety Board (NTSB) released a study in October 1988 revealing that at least 26 accidents of 189 heavy truck accidents from 1985 to 1987 conclusively involved drug or alcohol abuse. In one case, the driver of a heavy truck struck the rear of a queue of four other heavy trucks; the driver had not slept in the previous forty-four hours and had consumed alcohol, amphetamines, and cocaine in an attempt to stay awake.

Another unique subgroup appears to be young male drivers. An often-cited study (Compton, A Report to Congress 1988) of drug incidence among fatally injured young male drivers in California found higher rates of drug use in general and marijuana and cocaine use in particular than among the general population. One or more drugs were detected in 81 percent of 440 male drivers aged 15 to 34 killed in vehicle crashes, whereas two or more drugs were detected in 43 percent. In addition, drugs other than alcohol rarely were detected alone; the drugs usually were found in combination with alcohol and generally the BAC levels were 0.10 percent or higher. The use of drugs among young drivers is thought to present a greater risk than among the general population since youths are beginning to experiment with drugs and are inexperienced at driving.

The wide variety of drugs, their use in combination with alcohol or other drugs, and their availability combine to produce a major public safety problem to the nation's highways.

It is the consensus of the Highway Safety Planning Agency that passage of this legislation will provide law enforcement with an additional tool in which to remove the impaired driver from the state's highways.

Lorn M. Campbell  
Lorn M. Campbell  
Executive Director  
Alaska Highway Safety Planning Agency

02/08/94  
Date

NATIONWIDE COMPARISON  
IMPLIED CONSENT

IMPLIED CONSENT LAW TABLE  
(November 18, 1993)

State	Implied Consent Law Applies To DWI Alcohol and/or Drugs		Bodily Substances Tested				Who Selects Test?		More Than One Test Can Be Required?	Statutory Citations
	Alcohol	Drugs	Blood	Breath	Urine	Saliva	Driver	Police		
AL	X		X	X	X			X	X <sup>1</sup>	§ 32-3-192(c)
AK	X			X			N/A	N/A		§ 29.35.031(a)
AZ	X	X	X	X	X			X	X	§ 26-691(A)
AR	X	X <sup>1</sup>	X	X	X			X <sup>1</sup>	X	§ 5-65-202 & 203
CA	X	X	X <sup>1</sup>	X <sup>1</sup>	X <sup>1</sup>		X		X	Veh. Code § 23157(a) <sup>18</sup>
CO	X	X	X <sup>1</sup>	X <sup>1</sup>	X <sup>1</sup>	X <sup>1</sup>	J	J	X	§ 42-4-1202(3)(c)
CT	X	X	X	X	X			X		§ 14-227b
DE	X	X	X	X	X			X	X	21 § 2740 & 2741
DC	X	X	X	X	X			X <sup>1</sup>	X <sup>1</sup>	§ 40-302(a) & (b)
FL <sup>19</sup>	X <sup>1</sup>	X <sup>1</sup>	X <sup>1</sup>	X <sup>1</sup>	X <sup>1</sup>		J	J	X	§ 310.1932(1)(a)
GA	X	X	X	X	X	X <sup>20</sup>		X	X <sup>10</sup>	§ 40-3-55(a)
HI <sup>21</sup>	X		X	X			X		X <sup>11</sup>	§ 286-101
ID	X	X	X	X	X			X <sup>13</sup>	X <sup>12</sup>	§ 18-8007 & 18-8004
IL	X	X	X	X	X			X	X <sup>14</sup>	635 ILCS 5/11-501.1(e)

IMPLIED CONSENT LAW TABLE (continued)

State	Implied Consent Law Applies to DWI Alcohol and/or Drugs		Bodily Substances Tested				Who Selects Test?		More Than One Test Can Be Required*	Statutory Citations
	Alcohol	Drugs	Blood	Breath	Urine	Saliva	Driver	Police		
IN	X	X	X	X	X	..		X	X	89-30-6-2
IA	X	X	X	X	X			X	X	§321.6
KS	X	X	X	X	X	..		X	X	§8-1001(a)
KY	X	X	X	X	X			X	X	§189A.102(1)
LA*	X	X	X	X	X	..		X	X	§32:661
ME	X	X	X <sup>13</sup>	X <sup>14</sup>	X <sup>14</sup>			X <sup>14</sup>	X <sup>14</sup>	29 §1312
MD	X	X	X	X				X	X <sup>17</sup>	Trans. §16-205.1
MA*	X		X	X <sup>15</sup>				X <sup>15</sup>		90 §24(1)(f)
MA*	X	X	X	X	X			X <sup>16</sup>	X	§257.62(a)
MA*	X	X	X	X	X			X <sup>16</sup>	X <sup>16</sup>	§169.123, subd. 2
MS	X		..	X	..		N/A	N/A		§13-11-3
MO	X	X	X	X	X			X <sup>18</sup>	X	§577.020
MT	X		X	X	X			X		§61-8-402(1)
NH	X	X	X	X	X			X <sup>19</sup>	X	§39:609.06(1)
NV*	X	X	X	X	X	..		X <sup>19</sup>	X	§484.383.(1)
NH*	X	X	X	X	X			X	X	§265.84

## IMPLIED CONSENT LAW TABLE (continued)

State	Implied Consent Law Applies to DWI Alcohol and/or Drugs		Bodily Substances Tested				Who Admins Test?		More Than One Test Can Be Performed	Statutory Citations
	Alcohol	Drugs	Blood	Breath	Urine	Saliva	Driver	Police		
NI*	X	X		X			N/A	N/A		§39-4-50.2
NM	X	X	X	X				X	X	§66-8-107
NY	X	X	X	X	X	X		X	X	V&T Law §1194(G)(a)
NC	X	X	X <sup>11</sup>	X	X <sup>11</sup>	X <sup>11</sup>		X <sup>11</sup>	X	§20-16.2(a)
ND	X	X	X	X	X	X		X	X	§39-20-01
OH	X	X	X	X	X			X	X	§4511.191(A)
OK	X	X	X <sup>12</sup>	X <sup>12</sup>	X <sup>12</sup>	X <sup>12</sup>		X <sup>12</sup>	X <sup>12</sup>	47 §751
OR*	X			X			N/A	N/A		§813.100
PA*	X	X	X	X	X			X <sup>13</sup>	X <sup>13</sup>	75 §1547
PR*	X		X	X		X <sup>14</sup>	X <sup>14</sup>		X <sup>14</sup>	9 §1043
RI	X	X	X	X	X			X	X	§31-37-2.1
SC*	X	X	X	X	X			X <sup>15</sup>	X	§56-5-2050(a)
SD	X	X	X	X				X <sup>17</sup>		§32-23-10
TN	X	X	X	X	X			X		§§55-10-405(5) & -406(a)(1)
TX	X	X	X	X	X <sup>16</sup>	X <sup>16</sup>		X <sup>16</sup>	X	Act. 6711(5), §§1 & 2(a)
UT	X	X	X	X	X			X	X <sup>18</sup>	§§1-6-44.10(1)(a) & (b)

IMPLIED CONSENT LAW TABLE (continued)

State	Implied Consent Law Applies to DWI Alcohol and/or Drugs		Bodily Substances Tested				Who Selects Test?		More Than One Test Can Be Required <sup>4</sup>	Statutory Citations
	Alcohol	Drugs	Blood	Breath	Urine	Saliva	Driver	Police		
VT	X	X	X <sup>21</sup>	X				X	X	23 §1202(a)
VA	X	X	X	X			X <sup>22</sup>		X	§18.2-268
WA	X	X <sup>23</sup>	X <sup>24</sup>	X				X	X <sup>24</sup>	[4] 20.308(1)
WV	X		X	X	X			X <sup>25</sup>	X	§17C-5-4
WI	X	X	X	X	X			X	X	§343.305(2) & (3)
WY <sup>26</sup>	X	X	X	X	X			X <sup>26</sup>	X	§31-6-102(a)
<b>TOTALS</b>	<b>32</b>	<b>43</b>	<b>43</b>	<b>52</b>	<b>37</b>	<b>4</b>	<b>4</b>	<b>42</b>	<b>43</b>	

N/A=Not Applicable

<sup>21</sup>The law of this State limits the types of drugs/substances that can be considered for the purposes of determining whether a person has been driving while under the influence. I.e., the law does not cover driving under the influence of all drugs/substances.

<sup>22</sup>State law provides that "other bodily substances" may be tested but such substances are not specifically identified.

I.e., more than one type of bodily substance can be tested under the State's implied consent law.

<sup>23</sup>If the driver objects to a blood test, the officer shall designate one of the other tests.

<sup>24</sup>Controlled substances

<sup>25</sup>However, if the driver objects to a blood test, a breath or urine test may be used instead.

<sup>26</sup>Chemical testing of blood, breath or urine of alcohol concentrations; chemical testing of blood or urine of drug concentrations.

<sup>27</sup>For alcohol concentrations, tests on blood or breath are to be performed;

for drug concentrations, tests on blood, urine or saliva are to be performed. If the test is for alcohol concentration, the driver may select either a blood or breath test. For drug driving offenses, the officer may request the person to submit to a particular type of test (blood or urine). *Sanger v. Colorado Dept. of Revenue*, 740 P.2d 64 (Colo. App. 1987)

<sup>28</sup>The law enforcement officer shall select which chemical test is to be administered. However, a person may object to a particular test on valid religious or medical grounds.

<sup>29</sup>The driver is required to submit to two (2) chemical tests of their blood, breath or urine for alcohol or drugs.

IMPLIED CONSENT LAW TABLE (continued)

- 14 A breath test can only be performed to determine alcohol concentration. A urine test must be used to determine whether other drugs were in a body (blood). A blood test can only be performed on a driver who has been injured whose death test is a part of treatment at a medical facility.
- 15 The law specifies the type of tests that are to be given in certain DWI situations.
- 16 *McCasus v. State*, 371 S.E.2d 243 (Ga.App. 1983)
- 17 *State v. Griffin*, 744 P.2d 92 (Utah 1987)
- 18 *People v. Aycock*, 516 N.E.2d 783 (Ill.App. 3 Dist. 1987), and *People v. Edwards*, 514 N.E.2d 1346 (Ill.App. 4 Dist. 1987)
- 19 Sec. 31-50L.1(a) provides that "[a]n air test may be administered even after a blood or breath test or both has been administered."
- 20 A breath test is administered unless it is unreasonable to give such test. However, a person has a "duty" to submit to either a blood or urine test to determine a category of drug in the person's system and the concentration of such drug, if a law enforcement officer has probable cause to believe that the person was under the influence of a specific category of drug.
- 21 There are limits on when a blood test can be administered.
- 22 There is an exception that the law enforcement officer suspects the test.
- 23 A person may give their consent to tests of either blood or urine for the purpose of determining if there are other impairing substances in the person's body.
- 24 In addition to the statutory citation, see *Kiss v. King*, 691 S.W.2d 374 (Mo.App. 1985).
- 25 See also [§77.69] 99.
- 26 For the purpose of determining alcohol content, a person may refuse a blood test if a breath test is reasonably available. For the purpose of determining controlled drug content, a person must affirmatively refuse a blood or urine test or both.
- 27 A blood test is limited to persons who are unconscious or otherwise incapable of refusing a test. The officer may direct the administration of any other chemical analysis that may be affirmatively performed (120-16.2(a)).
- 28 Test or tests of blood or breath for alcohol: test or tests of blood, urine or saliva for "intoxicating substances".
- 29 *People v. Dept. of Public Safety*, 785 P.2d 532 (Colo.App. 1989) The law enforcement agency specifies the type of substance that is to be tested. *State v. City of Tulsa*, 837 P.2d 917 (Okla Cr. 1992)
- 30 *Leggett v. Com.*, 522 A.2d 173 (Pa. Commonwealth 1987) In situations involving driving under the influence of alcohol, the driver must be given two (2) consecutive breath tests. In this is not done, the test results cannot be admitted into evidence at a DWI trial. *Crow v. Dalton*, 571 A.2d 418 (Pa.Super. 1990)
- 31 *People v. Orange Grove*, 97 P.R.2d 463 (1969).
- 32 The law is not specific as to whether multiple tests can be administered.
- 33 To determine alcohol concentration, the person must be offered a breath test first; a blood test may be requested if it is not reasonably possible to obtain a breath sample. To determine a drug concentration, the person must submit to a urine test.
- 34 *State v. Katz*, 300 N.W.2d 523 (S.D. 1981), and *State v. Sauer*, Dept. of Public Safety, 308 N.W.2d 492 (S.D. 1985)
- 35 Art. 6701F.5, §1 also provides that a person may consent to give a specimen of another substance for the purpose of determining alcohol concentration. However, they are only required to provide either a blood or breath specimen.
- 36 *White v. State*, 711 S.W.2d 106 (Tex.App. - [14th Dist.] Houston 1986), & *State v. Gonzalez*, 850 S.W.2d 673 (Tex.App. - San Antonio 1993)
- 37 Notes: In *Green v. Schweiniunas*, 769 P.2d 218 (Utah 7pp. 1988), the court held that law enforcement officers have the authority to request more than one breath test sample from a driver under the implied consent law.

## IMPLIED CONSENT LAW TABLE (continued)

- 11) Under 21 S.C. 1102(c), if the law enforcement officer has "reasonable grounds" to believe that the driver was operating a motor vehicle while under the influence of drugs (narcotic substances), the driver is deemed to have given consent to a blood test. See also *Bates v. Georgia*, 522 A.2d 242 (Va. 1987) where the court held that there was no need to request a breath test prior to a blood test in situations where the driver has been charged with both driving under the influence of alcohol and drugs.
- 12) Usually a person has the right to select the type of test. *Breaker v. City*, 421 S.E.2d 674 (Va. App. 1992). However, if such a test is not available, they must submit to the other test. *Mason v. Conn.*, 425 S.E.2d 544 (Va. App. 1993).
- 13) Normally, the tests are for alcohol only. However, if there has been an injury, *Elzy* to cause death, a driver may be compelled to take a blood or breath test for determination the presence and/or concentrations of alcohol or drugs.
- 14) *Big Burger v. Dept. of Licensing*, 756 P.2d 133 (Wash. App. 1988), the court held that a refusal to submit to any type of testing could result in license revocation.
- 15) If a person refuses to submit to a blood test, the officer shall request either a breath or a urine test.
- 16) If the selected test is either blood or urine, the driver may select the other test. However, the officer may request a urine test if the driver is suspected of driving while under the influence of a controlled substance.
- 17) Either breath or blood tests are not sufficient to determine alcohol concentration. Blood tests are administered to determine the content of controlled substances.
- 18) *People v. Fazio*, 310 Cal. App. 2d 682 (Cal. App. 4 Dist. 1991).
- 19) If the first test is a breath test, the police officer can request a second test of either blood or urine (118-110021.07). However, the law is not clear as to whether the officer can submit a second breath test or (2) a blood (urine) if the first test was urine (blood). Also, the law is not clear on whether the officer can request a breath test either after a blood or urine test.
- 20) The law in California requires the officer to request a blood test if a person refuses to submit to a blood test, the officer must offer the person an alternative test. Likewise, if a person refuses to submit to a urine test, they must be offered an alternative test. The law does not specify the type or type of alternative test or tests. *Whitman v. Commissioner of Public Safety*, 477 N.W.2d 539 (Minn. App. 1991).

GENERAL ASSEMBLY OF MARYLAND  
REPORT OF THE  
TASK FORCE ON DRUNK  
AND  
DRUGGED DRIVING



1987 WINTER

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December 1, 1988

The Honorable Thomas V. Mike Miller, Jr., Co-Chairman  
The Honorable R. Clayton Mitchell, Co-Chairman  
Members of the Legislative Policy Committee


Ladies and Gentlemen:

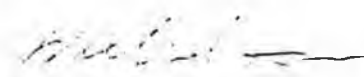
On behalf of the Task Force on Drunk and Drugged Driving, we are pleased to submit our report to you.

Since its appointment, the Task Force has met regularly. We wish to acknowledge the support of the individuals who attended and testified at the meetings and provided the Task Force with the benefit of their research, opinions, and suggestions.

The responsibility of the Task Force is serious and we hope the Task Force will continue to function in the 1989 Interim.

Respectfully submitted,

  
Laurence Levitan  
Co-Chairman

  
William S. Horne  
Co-Chairman

/sib

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## INTRODUCTION

In recent years, the problems associated with drunk and drugged drivers have increasingly become the focus of attention from both concerned citizens and government officials. The reason for this attention can be found in the statistics that quantify the tragic waste of human life and public resources at the hands of drunk and drugged drivers. In Maryland alone, alcohol has been identified as a contributing factor in the highway deaths of 2,624 people since 1981 (See Appendix 1 - "Relevant Statistics", for information on highway fatalities in which alcohol was a contributing factor and other pertinent statistics).

Beginning in 1981, the General Assembly of Maryland dramatically increased efforts to curb the drinking driver. During the period of 1981 through 1988, the General Assembly enacted over 30 laws to counteract the problems associated with individuals who drink and drive. These legislative measures include increased criminal and administrative penalties, prohibitions of specific behavior associated with drunk driving, enhanced driver education and rehabilitation programs, provision of additional enforcement tools to law enforcement and judicial personnel, and improved enforcement and treatment of juvenile offenders.

The statistics show that these efforts have met with considerable success. For example, there has generally been an increase since 1981 in the number of alcohol-related driving arrests and convictions. Even more

importantly, the percentage of highway fatalities in which alcohol was a contributing factor markedly decreased in the past few years. In 1981, alcohol was a contributing factor in 500 fatalities, 63% of the total highway fatalities. In 1987, these figures dropped to 309 fatalities, 37% of the total. Preliminary figures for 1988 are comparable with the 1987 figures (See Appendix 1).

In 1988, recognizing that the goal of removing the impaired driver from the highways had not been fully realized, the General Assembly passed House Joint Resolution 53\* establishing a Task Force on Drunk and Drugged Driving. The Task Force is composed of legislators, judges, law enforcement officials, a State's Attorney, the Administrator of the Motor Vehicle Administration ("MVA"), and other knowledgeable and concerned representatives of the public and private sectors.

The Task Force met regularly during the 1988 Interim and considered a wide range of issues including the establishment of new offenses and harsher penalties, testing for alcohol and drugs, treatment of juvenile offenders, and other impaired driver issues.

What follows is the Task Force's Report on Drunk and Drugged Driving including recommendations to the General Assembly.

---

\* Signed and designated Joint Resolution No. 15 by Governor William Donald Schaefter, May 27, 1988.

## DRUGS AND DRIVING

### Shock Trauma Study

One of the major problems investigated by the Task Force was the issue of drugged driving. To assist the Task Force in its investigation, Dr. Carl Soderstrom, a surgical staff member of the Maryland Shock Trauma Center of the Maryland Institute for Emergency Medical Services Systems briefed the Task Force on the results of a recent study of 1,023 patients, victims of both venicular and nonvenicular trauma.

Dr. Soderstrom stated that the radioimmune serum test (i.e., a type of blood test) used in the study reliably indicates use of marijuana and other cannabinoids ("THC") within a period of 3 to 4 hours before the test is performed. On the other hand, Dr. Soderstrom stated that a urine test is not useful for determining the specific time period of drug use.

According to Dr. Soderstrom the results of the study indicated for all

- 1) 15% tested positive for THC alone;
- 2) 19% tested positive for alcohol alone; and
- 3) 17% tested positive for both THC and alcohol.

Dr. Soderstrom indicated that, although various drugs were detected in patients, prescription drugs and over-the-counter drugs were not revealed as a major problem. In addition to marijuana and other cannabinoids, Dr.

Soderstrom found that 7% of drivers tested positive for PCP, cocaine, methaqualone, or methadone alone or in combination with another drug.

Enforcement

Section 21-902(c) of the Transportation Article prohibits an individual from driving or attempting to drive while so far under the influence of any drug, any combination drugs, or a combination of one or more drugs and alcohol that the individual cannot drive a vehicle safely. Section 21-902(d) prohibits an individual from driving or attempting to drive "while under the influence of any controlled dangerous substance...if the person is not entitled to use the controlled dangerous substance under the laws of this State." Based on the prevalence of both legal and illegal drug use in our society, it is clear that arrests for these charges are underrepresented. Table A below shows the number of citations received in the District Court on these drug-related driving offenses and the guilty dispositions for drug-related driving offenses, and the total number of all §21-902 (a), (b), (c), and (d) drug-and alcohol-related driving arrests and guilty dispositions.

TABLE A  
Drug-And Alcohol-Related Driving Offenses  
 TA §21-902(c)      TA §21-902(d)      All TA §21-902  
 (does not reflect  
 Circuit Ct. info.)

FY 1986			
Citations Received	352	414	33,302
Guilty Dispositions	77	45	10,843
FY 1987			
Citations Received	582	589	36,832
Guilty Dispositions	74	42	10,986
FY 1988			
Citations Received	739	620	42,367
Guilty Dispositions	103	68	11,217

THE  
FOLLOWING  
DOCUMENTS  
ARE  
POOR  
ORIGINAL  
COPIES

The need for greater prosecution of the current laws against drugged driving is cited in study by the Task Force of additional enforcement techniques and tools.

#### Drug Evaluation and Classification Training

Mr. William E. Scott, Director, Office of Alcohol and State Programs, Traffic Safety Programs, NHTSA, testified before the Task Force on the topic of drug evaluation and classification training for police officers. Mr. Scott stated that very few police officers are trained to recognize the symptoms of impairment by drugs other than alcohol. Mr. Scott recommended to the Task Force a program, developed by the Los Angeles Police Department (LAPD), which enables a police officer to systematically administer a battery of physical and physiological tests to determine:

- 1) Whether a driver is impaired;
- 2) If so, whether the impairment is drug-related or medically-related (i.e., illness or injury); and
- 3) If drug-related, the broad category of drugs likely to have caused the impairment.

Sgt. William Tower of the Maryland State Police also briefed the Task Force on this topic. Sgt. Tower's extensive qualifications for discussing this subject include aiding the U.S. Department of Transportation in the development of a program to train police officers in drug testing and

participating in the program sponsored by the LAPD. According to Sgt. Tower, 20% of drivers who are charged and tested for blood alcohol content have symptoms more serious than the BAC test indicates. Sgt. Tower stated that an individual trained under the LAPD program has a 90% success rate in determining the type of drug an individual had used.

The LAPD program has two stages. The first stage trains the officer to conduct standardized field sobriety tests on an individual to determine whether the individual is under the influence of drugs. This first stage includes a 1 day course on how to recognize the basic signs of drug impairment. The second stage is an intensive 7 day course on how to identify the clinical signs of drug impairment followed by 2-3 weeks of hands-on experience with people under the influence of drugs.

According to Sgt. Tower, several hundred of Maryland's police officers have completed the field sobriety training. He stated that he would conduct the 1 day course to complete the first stage of the training in mid-December.

#### Drug Testing

A major law enforcement tool that the Task Force studied was medical testing of suspected drugged drivers. Current law authorizes breath or blood tests for alcohol. House Bill 822 of 1988, "Vehicle Laws - Tests for Alcohol Concentration and Drug Content", would have authorized drug tests

for driver but received unfavorable action during the 1988 Session of the General Assembly. However, the House Judiciary Committee requested that the issue be studied in detail by the Task Force.

Mr. Scott of NHTSA and other individuals who testified before the Task Force endorsed the concept of drug testing for a driver who has been detained by a police officer having reasonable grounds to believe that the driver is under the influence of a drug. Approximately 32 states allow testing of a driver to determine the presence of drugs. In essence, the drug testing proposal contained in House Bill 322 of 1988 would:

- 1) Expand the current implied consent statute to include consent to test for drugs other than alcohol; and
- 2) Allow testing of specimens of urine and "other bodily fluids".

In addition, House Bill 322 of 1988 would:

- 1) Change the definition of "qualified medical individual" (used to determine who is authorized to withdraw blood for testing) to include any individual authorized by an agency designated by the Secretary of Health and Mental Hygiene;
- 2) Increase the number of days (from 20 to 30) before trial that the State is required to notify the defendant or the defendant's attorney of the State's intention to introduce test results as

evidence without the presence or testimony of the technician who administered the test and to deliver a copy of the test results;

- 3) Increase the number of days (from 10 to 20) before trial that a defendant is required to notify the court and the State if the defendant desires the technician who performed the test to be present and testify;
- 4) Provide that, if the case is transferred to a circuit court from the District Court, the State is not required to file a second notice;
- 5) If the case is transferred to a circuit court from the District Court, require the defendant to notify the court and the State at least 20 days before trial that the defendant desires the technician to be present and testify at trial;
- 6) If a postponement is granted in the District Court or a circuit court, require the defendant to notify the court in writing at least 20 days before trial that the defendant desires the technician to be present and testify at trial;
- 7) Add manslaughter by automobile, motorboat, locomotive, etc., and any violation of an alcohol restriction on a driver's license to those offenses for which a test of alcohol or other drugs is admissible in evidence.

Dr. Yale Caplan, State Toxicologist, testified on some of the issues contained in House Bill 822 of 1968. Dr. Caplan suggested specifying what drugs should be the subject of testing. According to Dr. Caplan, testing should be concentrated on marijuana and other cannabinoids, cocaine, phencyclidine (PCP), opiates, and amphetamines. Dr. Caplan also stated that the implied consent law would need to be amended to allow testing for the presence of drugs and testing of specimens other than blood or breath (e.g., urine and other bodily fluids).

Dr. Caplan also stated that a drug testing entity, that does not currently exist, would be necessary to perform drug testing. Dr. Caplan stated that neither the Maryland State Police nor the Office of the Chief Medical Examiner within the Department of Health and Mental Hygiene has the resources of office space, personnel, and equipment to perform drug testing.

Dr. Caplan estimated that approximately 1,000 tests would be performed in the first year of testing, 2,000 to 3,000 in the second year, and multiple thousands in the third and subsequent years. Dr. Caplan also predicted that court appearances and testimony may be required of testing personnel in a large number of these cases. Dr. Caplan also estimated a fiscal impact of \$1 to \$2 million to establish the testing laboratory.

In response to questions on the drug testing issue, Dr. Caplan stated that there are no specific levels for drug content in the body that can be legislatively established as is currently done with blood alcohol content.

Dr. Caplan suggested that limiting testing to detect the presence of the illegal drugs to which he referred would obviate the need to establish specific levels of drug content in the body for a multitude of legal and illegal drugs. Dr. Caplan also viewed the use of the drug test result as confirmatory evidence, that would be introduced at trial in addition to drug evaluation and classification testimony by the arresting police officer, rather than establishing presumptive levels of intoxication or under the influence.

In response to questions regarding what type of test indicates recent use of a drug, Dr. Caplan stated that a blood test offers a greater interpretive value than a urine test in determining the time period of drug use. Dr. Caplan noted also that a blood test may be obtained only by qualified medical personnel. In responding to further questions regarding the greater expense of conducting blood tests, Dr. Caplan agreed that the current arrangement under which the State pays for the BAC tests for both the State and the counties may be the subject of a budgetary controversy as the number of tests and their costs increase.

Peter C. Cobb, Executive Assistant for Public Safety, Office of the Governor, and a member of the Task Force, indicated that the Governor will not budget funds for drug testing for drivers until at least fiscal year 1990 unless legislation authorizing drug testing is enacted first. Mr. Cobb also indicated a preference for allowing the executive branch to determine programatically by regulation the specific drugs for which testing would be conducted.

The staff of the Task Force also provided the members with copies of the case of Franklin v. State, 8 Md. App. 134 (1969), which held that evidence that an individual had a drug within his biological system tends to show possession and/or control prior to taking the drug and that evidence, together with the individual's statement to a physician, is sufficient to sustain a conviction for the crime of possession of a controlled dangerous substance.

#### Commercial Motor Carrier Regulations

The federal commercial motor carrier regulations (see discussion on p. 17) reviewed by Mr. Rickert of the MVA also address drugged driving by commercial drivers. As with the alcohol-related driving offenses, for a first offense of driving under the influence of drugs, there would be a 1 year suspension from driving a commercial motor vehicle. For a second offense, there would be a lifetime disqualification.

#### Medical Advisory Board

The Task Force also received testimony from William Bricker, former Administrator of the MVA and an attorney in private practice. Mr. Bricker suggested to the Task Force that anyone who was convicted or granted probation before judgment for any drug-related offense (e.g., possession of a controlled dangerous substance) should be referred to the MVA Medical Advisory Board to determine whether the individual is fit to drive.

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## DRUG IMPAIRED DRIVING

### RESOLUTION 93-14 (new)

*WHEREAS, people who operate motor vehicles while under the influence of alcohol have long been known to cause thousands of crashes, injuries and deaths each year, but only recently has the magnitude of the problems caused by drug (other than alcohol) impaired drivers come to light; and*

*WHEREAS, a NHTSA report to Congress disclosed a frequency of drug use by fatally injured drivers is between 10-15 percent; and*

*WHEREAS, many studies have documented this finding, pointing to a national prevalence of drug impaired driving; and*

*WHEREAS, NHTSA has developed a standardized curriculum for training police officers as Drug Recognition Experts (DRE);*

*NOW THEREFORE BE IT RESOLVED, that NAGHSR encourages states to adopt legislation which makes it illegal to operate a motor vehicle while impaired by drugs other than alcohol or in combination with alcohol; and*

*BE IT FURTHER RESOLVED, that states allow the chemical test sample to be analyzed to determine the presence and/or concentration of drugs other than alcohol.*

*Submitted by: Impaired Driving Committee*

**RESOLUTIONS/STATEMENTS  
OF SUPPORT**

NATIONAL SAFETY COUNCIL

POLICY STATEMENT

COMMITTEE ON ALCOHOL AND OTHER DRUGS

ENFORCEMENT OF LAWS AIMED AT ALCOHOL-IMPAIRED DRIVING

There is strong scientific consensus suggesting that the public's perception of effective enforcement appears to be a strong deterrent to alcohol impaired driving. In order to enhance the effectiveness of enforcement activities in preventing impaired driving, the National Safety Council recommends that jurisdictions:

Implement new enforcement programs requiring chemical tests of body substance samples for all drivers involved in nighttime crashes.

Consider the use of new technologies such as passive alcohol sensors and motor vehicle ignition interlocks.

Develop and use highly visible and widely publicized enforcement approaches that increase the public's perception of the risk of apprehension.

Passed by the Committee on Alcohol and Other Drugs, November 4, 1992.

RECENT ACTIVITIES OF THE INTERNATIONAL ASSOCIATION FOR  
CHEMICAL TESTING

A Report to the National Safety Council Committee on Alcohol and Other  
Drugs  
October 6, 1993  
Chicago, IL

prepared by Patrick Harding, LACT liaison to the CAOD

Mr. Chairman,

The International Association for Chemical Testing continues to grow in membership. In keeping with the pledges of our two organizations to keep each other informed of activities, members of the COAD have been placed on our mailing list to receive the LACT Newsletter. Additionally, the minutes of COAD meetings are summarized and published in the Newsletter for the benefit of LACT members.

The following report is a summary of the some of LACT's recent activities:

RESOLUTIONS

**"Mandatory Alcohol/Drug Testing of All Drivers in Fatal and Serious Injury Crashes"**

Whereas, alcohol and other drug involvement is a major factor in fatal and serious traffic crashes, and

Whereas, the best method for confirming alcohol and other drug involvement in drivers is to obtain an alcohol/drug test, and

Whereas, currently only 73 percent of fatally injured drivers and 25 percent of surviving drivers in fatal crashes are tested for alcohol in the United States, and

Whereas, drug testing of fatally injured drivers and surviving drivers in fatal and serious injury crashes is not routinely done, and

Whereas, it is important for the scientific community to be able to accurately determine alcohol and other drug involvement in all fatal and serious injury traffic crashes in order to develop and evaluate intervention measures; be it therefore

RESOLVED that the International Association for Chemical Testing urges all jurisdictions to pass and actively implement laws requiring alcohol/drug testing of all drivers involved in fatal and serious injury producing crashes. Such laws, if implemented, would allow year to year tracking of alcohol and other drug involvement in all fatal and serious injury producing crashes in order to evaluate the effectiveness of alcohol/drug countermeasures. Further, such laws would allow and authorize law enforcement agencies to identify alcohol and other drug impaired drivers involved in fatal and serious injury crashes who heretofore have gone undetected.

Adopted March 26, 1993

STATE:  
General Reference:

ARIZONA  
Arizona Revised Statutes Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of intoxicating liquor §28-692(A)(1)
Illegal Per Se Law (BAC/BraC Level):	0.10 <sup>1&amp;2</sup> and Any Controlled Substance in a Person's Body <sup>3</sup> §28-692(A)(2) & (3)
Presumption (BAC Level):	0.10 §28-692(E)(3)
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Any Drug, a vapor releasing substance containing a toxic substance or (2) a combination of liquor, drugs or toxic vapor releasing substance if the person is impaired to the slightest degree. §28-692(A)(1)
Other:	For Commercial Motor Vehicle Operators, see p. 3-27.

Chemical Breath Tests for BAC/BraC Level:

Preliminary Breath Test Law:	Yes §28-691.01 (Based on reasonable suspicion of a DWI offense.)
Implied Consent Law:	
Arrest Required (Yes/No):	Yes §28-691(A)
Implied Consent Law Applies to:	
Drugs (Yes/No):	Yes §28-691(A)
Refusal to Submit to Chemical Test:	
Admitted into Evidence:	Yes (Criminal & Civil Cases) §28-692(I)
Other Information:	Special Note: Police officers may request persons (e.g. medical facility personnel), who collect blood, urine or other bodily substances from suspected DWI offenders, to supply samples of such substances to law enforcement authorities for testing; see §28-692(J). Such samples can also be obtained via search warrants; see §28-691(D).

Chemical Tests of Other Substances for BAC Level  
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes §28-691
Urine:	Yes §28-691
Other:	"Other bodily substances" §28-691

<sup>1</sup>This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more. §28-692(O)

<sup>2</sup>It is a Class 1 misdemeanor for any person under 21 years old to operate a motor vehicle with any "spirituous liquor" in their body. Jail-not more than 6 mos; fine-not more than \$2,500. See §§4-244(34), 4-246(B), 13-701, 13-707, 13-801 & 13-802.

<sup>3</sup>Except in cases where a person was impaired in the "slightest degree," a person is not guilty of this offense if they are legally entitled to use these drugs. §28-692(B)

STATE:  
General Reference:

CALIFORNIA  
West's Annotated California Codes

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of an alcoholic beverage Veh. Code §§23152 & 23153
Illegal Per Se Law (BAC/BrAC Level):	0.08 <sup>1&amp;2</sup> Veh. Code §§23152(b) and 23153(b)
Presumption (BAC Level):	0.08 Veh. Code §23155(3)
Types of Drugs/Alcohol and Drugs:	Under the influence of (1) Any Drug or (2) a Combination of Alcohol and Any Drug Veh. Code §§23152 & 23153
Other:	For Commercial Motor Vehicle Operators, see p. 3-45. For bicycle riders, see the Special Note below

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	Yes Veh. Code §23157(h) (Note: A PBT may be conducted without legislative authority. A.G. Opinion 98-1102, Oct. 23, 1989)
Implied Consent Law:	
Arrest Required (Yes/No):	Yes Veh. Code §23157
Implied Consent Law Applies to Drugs (Yes/No):	Yes Veh. Code §23157(a)(1)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal & Civil Cases) Veh. Code §23157(a)(4)
Other Information:	A person, who has been arrested for a DWI offense, may be compelled to submit to a blood test for either alcohol concentration or the presence of drugs. See <i>Mercer v. Department of Motor Vehicles</i> , 309 P.2d 494 (Cal. 1957).

Chemical Tests of Other Substances for BAC Level  
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes Veh. Code §23157
Urine:	Yes Veh. Code §23157
Other:	None

<sup>1</sup>Special juvenile offense at 0.05 (Standard: Percent by weight of alcohol in the blood): see Veh. Code §23140(a).

<sup>2</sup>The regular standards for BAC and BrAC (respectively grams of alcohol per 100 milliliters of blood and grams of alcohol per 210 liters of breath) are used for the illegal per se offense.

<sup>3</sup>Note: It is illegal to be under the influence of certain "controlled substances" irrespective of whether the offender was operating a motor vehicle. Health and Safety Code §11360.

**Special Note:** Under Veh. Code §21200.5, it is illegal to ride a bicycle on the highways while under the influence of either alcohol or drugs. This section provides that a person committing this offense may be fined not more than \$250. This section further provides that a person under 21 years old, who commits this offense, is subject to license suspension under Veh. Code §13202.5; see the Special Note on p. 3-50 for details on this license suspension.

STATE:  
General Reference:

COLORADO  
Colorado Revised Statutes

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of alcohol/Impaired by the consumption of alcohol §42-4-1202(1)(a) & (b)
Illegal Per Se Law (BAC/BrAC Level):	0.10 <sup>1</sup> §42-4-1202(1.5)(a)
Presumption (BAC Level):	>0.05-Driving while impaired 0.10-Driving under the influence §42-4-1202(2)(b) & (c)
Types of Drugs/Drugs and Alcohol:	(1) Any Drug or (2) a Combination of Alcohol and Drugs <sup>2</sup> (applies to both driving under the influence and driving while impaired) §42-4-1202(1)(a) & 42-4-1202(1)(b)
Other:	For Commercial Motor Vehicle Operators, see p. 3-63.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	Yes §42-4-1202(2.5)
Implied Consent Law:	
Arrest Required (Yes/No):	No Only probable cause is required; an actual arrest is not necessary. §42-4-1202(3)(a)(II) & III
Implied Consent Law Applies to Drugs (Yes/No):	Yes §42-4-1202(3)(a)(III)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) §42-4-1202(2)(a)
Other Information:	A persons's blood may be taken from them by force if there is probable cause that they committed criminally negligent homicide with a motor vehicle, vehicle homicide, assault in the third degree with a motor vehicle or vehicle assault. §42-4-1202(3)(a)(IV)

Chemical Tests of Other Substances For BAC Level  
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes (Alc. & Drugs) §42-4-1202(3)(a)(II) & (III)
Urine:	Yes (For Drugs only) §42-4-1202(3)(a)(III)
Other:	Saliva (For Drugs only) §42-4-1202(3)(a)(III)

<sup>1</sup>This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more.

<sup>2</sup>A "drug" is defined as either a substance, that is intended to cure or prevent disease, listed in the U.S. Pharmacopoeia, or a controlled substance; see §§12-27-303(7) & (13) and 42-4-1202(1)(d).

STATE:  
General Reference:

FLORIDA  
Florida Statutes Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of alcoholic beverages <sup>1</sup> §316.193(1)(a)
Illegal Per Se Law (BAC/BrAC Level):	0.10 <sup>1&amp;2</sup> §§316.193(1)(b) & 316.1932(b)1
Presumption (BAC Level):	None
Types of Drugs/Drugs and Alcohol:	Under the influence of a Controlled Substance/Chemical Substance listed in §877.111; §§316.193(1)(a) & 316.1931
Other	1) A BAC/BrAC level of 0.10 <sup>3</sup> is prima facie evidence of driving under the influence §316.1934(2)(c) 2) See the Special Note below. 3) For Commercial Motor Vehicle Operators, see p. 3-100. 4) A person arrested for a DWI offense cannot be released from custody until (1) they are no longer under the influence of alcohol or other chemical substance, (2) their BAC level is less than 0.05 or (3) eight (8) hrs have elapsed from the time of their arrest. §316.193(9)

<sup>1</sup>The offense of "driving under the influence" includes (1) driving under the influence of alcoholic beverages or (2) driving with a blood or breath level of 0.10 or more. See §316.193(1)(a) & (b) and State v. Rolle, 560 So.2d 1154 (Fla. 1990).

<sup>2</sup>This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more. The standard definitions of BAC and BrAC are used; see §316.1932(b)1.

<sup>3</sup>Standards: Percent by weight of alcohol in either the blood or breath. §316.1934(2)(c)

Special Note: A jury instruction, that was based on a verbatim reading of §316.1934(2)(c), was held to be unconstitutional in that it created a mandatory "irrebuttable" presumption that shifted the burden of proof of the DWI offense to the defendant; see *Wilhelm v. State*, 568 So.2d 1 (Fla. 1990). Notwithstanding this case, the statutory language itself has been held constitutional in a prior decision; see *State v. Rolle*, 560 So.2d 1154 (Fla. 1990). Note: A Federal court has held in similar circumstances that there was no constitutional infirmity. However, the Federal court did express its concern that a jury could be confused with the term "prima facie". Despite this concern, the court felt that no unconstitutional mandatory presumption had been created when this instruction was viewed in conjunction with the other jury instructions that were given. See *Santiago Sanchez Defuentes v. Dugger*, 923 F.2d 801 (11th Cir. 1991).

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	No
Implied Consent Law:	
Arrest Required (Yes/No):	Yes §316.1932(1)(a) Note: Under §316.1932(1)(c), an arrest is not a prerequisite to the taking of a blood sample if the driver is taken to a medical facility for treatment as a result of an accident. See <i>Kenson v. State</i> , 577 So.2d 694 (Fla.App. 3 Dist. 1991).
Implied Consent Law Applies to Drugs (Yes/No):	Yes §316.1932(1)(a) <sup>1</sup>
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) §§316.1932(1)(a) & 316.1932(1)(b)
Other Information:	A blood test may be given a driver without their consent <u>only</u> if they have been involved in an accident resulting in either death or serious bodily injury. See §316.1933(1) and <i>Carbone v. State</i> , 564 So.2d 1253 (Fla.App. 4 Dist. 1990), and <i>State v. Perez</i> , 531 So.2d 961 (Fla. 1988).

Chemical Tests of Other Substances for BAC Level  
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes—Limited A blood test, for the purposes of implied consent, may be taken only if the driver appears for treatment at a medical facility and the administration of a breath/urine test is impractical or impossible. §316.1932(1)(b)
Urine:	Yes—Limited Under §316.1932(1)(a), there is an implied consent to submit to a urine test for the purpose of detecting the presence of controlled substances.
Other:	None

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	Yes Applies only to DWI manslaughter/veh homicide offs; see §316.656.
Anti-Plea Bargaining Statute (Yes/No):	Yes Only applies if BAC level is 0.20 or more or for DWI manslaughter/veh homicide offs; see §316.656.
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes A person convicted of a DWI offense may be referred to substance abuse evaluation; see §316.193(5).

<sup>1</sup>The implied consent law, as applied to driving while under the influence of drugs, provides only for the testing of urine.

THE  
FOLLOWING  
DOCUMENTS  
ARE  
POOR  
ORIGINAL  
COPIES

STATE:  
General Reference:

IDAHO  
General Laws of Idaho Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of alcohol §18-3004(1)(a)
Illegal Per Se Law (BAC/BrAC Level):	0.10 <sup>1</sup> §18-3004(1)(a)
Presumption (BAC Level):	None
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Any Drug, (2) Intoxicating Substance or (3) a Combination of Any Drug and Alcohol §§18-3004(1) a & 18-3004(5)
Other:	For Commercial Motor Vehicle Operators, see below.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	No
Implied Consent Law:	No
Arrest Required (Yes/No):	No
Implied Consent Law Applies to Drugs (Yes/No):	Yes §18-3002(1)
Refusal to Submit Chemical Test Admitted into Evidence:	Yes (Criminal Cases) State v. Ego, 328 P.2d 1055 (1958)
Other Information:	Under §18-3002(5)(b), a law enforcement officer may order a "qualified person" to withdraw blood from a driver for evidential purposes in cases where there is probable cause to believe that such driver has committed either a 3rd aggravated/homicide offense. Comment: This provision appears to allow law enforcement officers to obtain a blood sample via force.

This State's illegal per se law also makes it an offense to operate a motor vehicle with either (1) a breath alcohol concentration level of 0.10 or more or (2) a urine alcohol concentration of 0.10 or more.

The police need only "reasonable grounds" of a DWI off before the implied consent law is applicable; see §18-3002(1). However, §18-3002(4)(b) appears to indicate that "probable cause" is needed.

DWI Offenses and Commercial Motor Vehicles (CMV)/Commercial Driver's Licenses (CDL): A person is "disqualified" from operating a CMV for 1 yr. (mand.) (2 yrs (mand.) if transporting hazardous materials) if, while driving a CMV, they (1) have a BAC/BrAC/"Bodily Substance" level of 0.04 or more, (2) are under the influence of alcohol or a controlled substance or (3) refuse to submit to a chemical test for an alcohol concentration. For either (1) a subsequent violation or (2) a combination of two or more violations of any of the above listed items, the "disqualification" is for life (mand.). A person, who operates a CMV with an alcohol concentration of 0.04 or more or while under the influence of alcohol/drugs, is subject to DWI criminal sanctions. In addition, a CMV operator who has any "detectable" amount of alcohol in their system must be placed "out-of-service" for 24 hours. See §§49-105(b), 49-104(3), 49-335 (Reference is made to 49 CFR part 383.), 18-3002(3)(a), 18-3004(1)(b) & (5), 18-3004(4), and 18-3005(2) & (3).

Chemical Tests of Other Substances for BAC Level  
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes	§§18-3002(1) & 18-3004
Urine:	Yes	§§18-3002(1) & 18-3004
Other:	None	

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No
Anti-Plea Bargaining Statute (Yes/No):	No
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes (Alcohol Evaluation) §18-3005(9)

Sanctions for Refusal to Submit to a  
 Chemical Test:

Refusal to Take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail):	N/A
Administrative Licensing Action (Susp/Rev):	N/A
Other:	N/A

Refusal to Take Implied Consent

Chemical Test:

Criminal Sanction (Fine/Jail):	No
Administrative Licensing Action (Susp/Rev):	<u>1st Refusal</u> -180 dys susp (mand); <u>2nd Refusal</u> (w/n 5 yrs)-1 yr susp (mand); §18-3002(2)(c), (4)(b) & (4)(c)
Other:	None

Sanctions Following a Conviction for a DWI Offense:

Criminal Sanctions:

Imprisonment:	<u>1st off</u> Misc-Not more than 6 mos; <u>2nd off</u> (w/n 5 yrs) Misc-10 dys to 1 yr; <u>3rd &amp; sub off</u> (w/n 5 yrs) or <u>4th or sub off</u> (w/n 10 yrs) Felony-Not more than 5 years. Aggravated DWI where there is bodily harm/ disfigurement-Not more than 5 years. See §§18-3005 & 18-3006.
Mandatory Minimum Term:	<u>1st off</u> Misc-None; <u>2nd off</u> (w/n 5 yrs) Misc-10 dys (must serve 48 con. hrs); <u>3rd &amp; sub off</u> (w/n 5 yrs) or <u>4th or sub off</u> (w/n 10 yrs) Felony-30 dys; <u>Aggravated DWI off</u> where there is bodily harm/disfigurement-30 dys. See §§18-3005 & 18-3006.

<sup>1</sup>Historical Note: Under Art. 5, §13 of the State's constitution, the legislature may provide for mandatory minimum sanctions. This constitutional provision indirectly abrogated the Idaho Supreme Court's decision in State v. McCoy, 486 P.2d 247 (Idaho 1971), that had voided a statute requiring mandatory sanctions.

STATE:

ILLINOIS

General Reference:

Smith/Hurd Illinois Annotated Statutes

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of alcohol Ch. 95%, 111-501(a)(2)
Illegal Per Se Law (BAC, BrAC Level):	0.10 <sup>1</sup> or Any Amount of Cannabis/Controlled Substance <sup>2</sup> Ch. 95%, 111-501(a)(1) & (5)
Presumption (BAC Level):	0.10 Ch. 95%, 111-501.2(b)(3) & 11-501.6(a)(2)
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Any Drug or (2) a Combination of Any Drug and Alcohol See Ch. 95%, 111-501(a)(3) & (4).
Other:	For Commercial Motor Vehicle Operators, see s. 2-147.

Chemical Breath Tests for BAC, BrAC Level:

Preliminary Breath Test Law:	Yes-Limited <sup>3</sup> Ch. 95%, 111-501.5
Implied Consent Law:	
Arrest Required (Yes/No):	Yes Ch. 95%, 111-501.1 See the Special Note below.
Implied Consent Law Applies to Drugs (Yes/No):	Yes Ch. 95%, 111-501.1(a)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) See Ch. 95%, 111-501.2(c) & 11-501.6(f) and Peppia v. Thomas, 553 N.E.2d 656 (Ill.App. 2 Dist. 1990). A BAC (blood test) test may be taken by force for a DWI offense (injury or non injury related) as long as the police have "probable cause" of such offense. See Peppia v. Byrd, 574 N.E.2d 1059 (Ill.App. 4 Dist. 1991), and Peppia v. Yant, 570 N.E.2d 3 (Ill.App. 2 Dist. 1991).
Other Information:	

<sup>1</sup>This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more. Ch. 95%, 111-501.2(a)(5)

"as found in the blood or urine (resulting from unlawful use or consumption)." 95%,

111-501(a)(5)

<sup>3</sup>Before a PBT can be administered, a law enforcement officer must have probable cause to believe that the driver is violating the DWI law. The test is given prior to an actual DWI arrest for the purpose of assisting the officer in determining whether to require a chemical (evidentiary) test under the implied consent law.

**Historical Note:** Under Ch. 95%, 111-501.6(a), which is now void, a law enforcement officer could request that a person, via "implied consent", submit to a chemical test of their blood, breath or urine for alcohol or drug content based only on "probable cause" that the person was responsible for an accident that resulted in either an injury or a death. There was no requirement that there be "probable cause" of an offense (e.g. DWI). Because of this deficiency, the Illinois Supreme Court declared Ch. 95%, 111-501.6 unconstitutional under both the State and Federal constitutions. *King v. Ryan, Secretary of State*, \_\_\_ N.E.2d \_\_\_ (Ill. 1992) (1992 Ill. LEXIS 198) The sanctions for refusal to submit to this test were the same as for refusal under the regular implied consent law. Ch. 95%, 111-501.1

STATE - Illinois

Chemical Tests of Other Substances for BAC Level  
Which Are Authorized Under the Implied Consent Law:

Blood: Yes Ch. 92½, 111-501.1  
Urine: Yes Ch. 95½, 111-501.1  
Other: None

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No): No  
Anti-Plea Bargaining Statute (Yes/No): No<sup>1</sup>  
Pre-Sentencing Investigation Law (PSI)  
(Yes/No): Yes Ch. 95½, 111-501.1

Sanctions for Refusal to Submit to a  
Chemical Test:

Refusal to Take a Preliminary Breath Test:  
Criminal Sanctions (Fine/Jail): None  
Administrative Licensing Action  
(Susp/Rev): None  
Other: None

Refusal to Take Implied Consent

Chemical Test:

Criminal Sanction (Fine/Jail): None  
Administrative Licensing Action  
(Susp/Rev):

1st refusal-Susp for 6 mos. Note: A Judicial  
Driving Permit is available; see Footnote No. 2  
(under Admin. per se on p. 3-145 for details).  
Also, restricted driving privileges are  
available under 95½, 116-206.1/3. subsequent  
refusals<sup>2</sup> (w/in 5 yrs)-Susp for 2 yrs; 6 mos  
mandatory; a restricted license may be issued  
after this 6 month period. See Footnote No. 2  
on p. 3-146. Ch. 95½, 116-206.1/3, 6-206.1,  
6-208.1 and 11-501.1

Other: None

Criminal Sanctions:

Imprisonment: 1st & 2nd offs (Class A misd)-Less than 1 yr;  
subsequent offs<sup>3</sup> (Class 4 felony)-1-3 yrs. Ch.  
36, 111C.5-3-1(a)(7) & 1005-3-3(a)(1) and Ch.  
95½, 111-501. See Footnote No. 2 on p. 3-145.

<sup>1</sup>Note: A defendant cannot obtain deferred judgement and be placed on supervision if within the past 10 years they have either (1) been convicted of DWI, (2) pleaded guilty to or stipulated facts supporting the conviction of a DWI offense or (3) received supervision for a prior DWI off. Ch. 38, 111005-6-1(c) and 1005-6-1(d)

<sup>2</sup>On a refusal where the person has had a previous DWI offense conviction or admin. per se violation (w/in 5 yrs). Ch. 95½, 111-500

<sup>3</sup>This offense is defined as "Aggravated Driving Under the Influence of Alcohol or Drugs or a Combination of Both". Ch. 95½, 111-501(d)

STATE:  
General Reference:

INDIANA  
Burn's Indiana Statutes Annotated

Basis for a DWI Charge:

Standard DWI Offense

Operating a vehicle while intoxicated  
IC9-30-5-2 (The term "intoxicated" is defined  
as under the influence of alcohol, drugs, etc.;  
see IC9-30-5-26.)

Illegal Per Se Law (BAC Level)

0.10<sup>1</sup> IC9-30-5-1(a) or Any Amount of a  
Controlled Substance<sup>2</sup> IC9-30-5-1(b)  
0.10<sup>2</sup>

Presumption BAC Level:

Types of Drugs/Drugs and Alcohol:

Under the influence of: I) Any Drug, II) a  
Controlled Substance or III) Any Combination of  
Alcohol and Drugs IC9-30-5-2 & IC9-30-2-36

Notes:

0.10 BAC is also prima facie evidence of  
intoxication. IC9-30-2-101

See footnote No. 4 concerning school bus  
operators.

For Commercial Motor Vehicle Operators, see p.  
3-150.

Chemical Breath Tests for BAC Levels:

Preliminary Breath Test Law:

No (Note: PBT law, formally IC9-30-5-2,  
repealed by P.L. 441 enacted in 1982.)

Implied Consent Law:

Arrest Required (Yes/No):

No (A request for a test must be based on  
probable cause. However, an actual arrest is  
not required. See IC9-30-5-2 and Clark v  
State, 370 N.E.2d 185 (Ind. 1978).)

Implied Consent Law Applies to  
Drugs (Yes/No):

Yes IC9-30-5-2

Refusal to Submit to Chemical Test:

Admitted into Evidence:

Yes (Criminal & Civil Cases) IC9-30-5-3(b)  
In accidents where there has been either a  
fatality or a serious injury, a blood sample may  
be obtained from a driver suspected of DWI via  
force. IC9-30-5-3(g)

Other Information:

<sup>1</sup>Standard: Percent by weight of alcohol in the blood. IC9-30-5-1(a)

<sup>2</sup>This state's illegal per se law also makes it an offense (Class A misdemeanor) for a person to operate a motor vehicle with any amount of a controlled substance in their blood. Exception: It is a defense to this offense if it is shown that the defendant was using a controlled substance via a valid prescription. IC9-30-5-1(c)

<sup>3</sup>Under IC9-30-5-15(b)(2), a chemical test indicating a BAC level of 0.10 is to be taken as a presumption of such BAC level.

<sup>4</sup>It is a Class A Misd. to consume either alcohol or a controlled substance within six (6) hours of operating a school bus. IC90-3.1-2-1.6 Sanctions: Jail-not more than 1 yr; fine-not more than \$5,000. IC35-50-2-7 & IC35-50-3-1

STATE - Indiana

Chemical Tests of Other Substances for BAC Level  
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes <sup>1</sup>
Urine:	Yes <sup>1</sup>
Other:	Any other bodily substance <sup>1</sup>

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No
Anti-Plea Bargaining Statute (Yes/No):	No
Pre-Sentencing Investigation Law (PSI) (Yes/No):	No

Sanctions for Refusal to Submit to a  
Chemical Test:

Refusal to Take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail):	N/A
Administrative Licensing Action (Susp/Rev):	N/A
Other:	N/A

Refusal to Take Implied Consent  
Chemical Test:

Criminal Sanction (Fine/Jail):	Yes-Limited <sup>2</sup>
Administrative Licensing Action (Susp/Rev):	1-yr susp <sup>2,3</sup> (May not be mandatory if there is a DWI conviction. <sup>3</sup> ) IC9-30-6-9(a) See Footnote No. 3 on p. 3-157. (Note: A driver's license may be reinstated if the DWI charges are dismissed. IC9-30-6-11(a)(1))
Other:	None

<sup>1</sup>The implied consent law requires a driver to submit one or more "chemical tests". The substances that may be tested are breath, blood, urine or any other bodily substance. IC9-30-6-1 & IC9-30-6-6(a)

<sup>2</sup>Refusal to submit to a implied consent test, where there has been an accident in which there has been a death or a serious bodily injury likely to cause death, is a class C Infraction (a fine of not more than \$500). IC9-30-7-5 & IC34-4-32-4(c) In addition, the court may suspend a persons license for not more than 1 yr. IC9-30-7-5

<sup>3</sup>This susp. is consecutive to any susp. for a DWI offense. However, if a court finds in the sentence order for a DWI Conviction that it is in the best interest of society, it may terminate all or any part of this suspension. IC9-30-5-14(b)

STATE:

NEBRASKA

General References:

Revised Statutes of Nebraska and  
Nebraska Administrative Code (RAC)

Basic for a DWI Charge:

Standard DWI Offense	Under the influence of alcoholic liquor §39-669.07(1)(a)
Illegal Per Se Law (SAC/RAC Level): Presumption (SAC Level):	0.10 <sup>1</sup> §39-669.07(1)(b) & (c) None
Types of Drugs/Drugs and Alcohol: Other:	Under the influence of Any Drug §39-669.07(1)(a) For Commercial Motor Vehicle Operators, see §39-669.07(2).

Chemical Breath Tests for SAC/RAC Level:

Preliminary Breath Test Law:	Yes §39-669.08(1)
Implied Consent Law:	
Arrest Required (Yes/No):	Yes §39-669.08(1)
Implied Consent Law Applies to Drugs (Yes/No):	Yes §39-669.08(1)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes §39-669.08(2) (Criminal Cases) and State v. Romell, 204 N.W.2d 573 (1973)
Other Information:	A driver, who has been involved in an accident and where there is reasonable grounds that the driver is DWI, may be required to submit to a chemical test to determine if they have either alcohol or drugs in their system. Injury or death is not a prerequisite for this requirement. §39-669.08(3)

Chemical Tests of Other Substances for SAC Level  
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes §39-669.08(1)
Urine:	Yes §39-669.08(1)
Other:	None

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No <sup>2</sup>
Anti-Plea Bargaining Statute (Yes/No):	No
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes <sup>3</sup> Alcohol assessment (screening) for either a 1st offender or a sub. offender who has not received such an assessment. §39-669.07(3)

<sup>1</sup>This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more. Note: Illegal per se based on alcohol concentration in urine was repealed. Sec. 4 of L.B. 291 enacted in 1992

<sup>2</sup>A surviving driver (or pedestrian under 16 years old), who is involved in an accident where there has been a fatality, shall be required to submit to a SAC chemical test. The results of such test, however, can only be used for statistical purposes. §§39-6,104.08 & 39-6,104.09

<sup>3</sup>Note: Under §29-3604, pretrial diversion of DWI cases is prohibited.

<sup>4</sup>"A court may order a presentence investigation in any case " §29-2261(2) & (3)

Sanctions for Refusal to Submit to a  
Chemical Test:

Refusal to Take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail):	Class V misd \$100 fine, no imprisonment §§28-106 & 39-669.08(3)
Administrative Licensing Action (Susp/Rev):	None
Other:	None

Refusal to Take Implied Consent  
Chemical Test:

Criminal Sanction (Fine/Jail):	C1 W misd: <u>1st off</u> -Not more than \$500/60 dys; <u>2nd off</u> (w/n 3 yrs)-Not more than \$500/90 dys; <u>3rd off</u> (w/n 3 yrs)-Not more than \$500/1 yr; <u>4th</u> <u>or sub. off</u> (w/n 3 yrs)-Not more than \$10,000/5 yrs §§28-106 & 39-669.08
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Mandatory Sanctions:

I. If probation is not granted: 1st off-5200/7  
dys<sup>1</sup>; 2nd off (w/n 3 yrs)-\$500/30 dys<sup>1</sup>; 3rd off  
(w/n 3 yrs)-\$500/90 dys<sup>1</sup>; 4th or sub. off (w/n 3  
yrs)-\$500/1 yr<sup>1</sup> §§28-106 and 39-669.08(4)(b) &  
(c)

II. If probation is granted: 1st off-None; 2nd  
off (w/n 3 yrs)-48 hrs<sup>1</sup>; 3rd or sub. off (w/n 3  
yrs)-7 dys<sup>1</sup> §§28-106 and 39-669.08(4)(b) & (c)  
See the Comment on p. 3-285.

Administrative Licensing Action  
(Susp/Rev):

I. The following revocations are mandatory if  
probation is not granted:<sup>3</sup> 1st off-Rev 6 mos;  
2nd off-Rev 1 yr; 3rd and sub. off-Rev 15 yrs<sup>2</sup>  
§§28-106 & 39-669.08

II. If probation is granted, the following  
mandatory revocations must be imposed:<sup>3</sup> 1st  
off-Rev 60 dys; 2nd off-Rev 6 mos; 3rd and sub.  
off-Rev 1 yr §§28-106 & 39-669.08

III. Administrative action<sup>4</sup>: 1st and sub.  
refusals-Rev. 1 yr (mand) §39-669.16 & 247 NAC  
§026

Other:

None

<sup>1</sup>The period of imprisonment, it appears, must be served consecutively. State v. Texei, 433 N.W.2d 541 (Neb. 1989)

<sup>2</sup>Reduced to 5 yrs provided the person (1) has completed a chemical dependency program, (2) has not been convicted of either a DWI or implied consent offense, (3) has abstained from the excessive consumption of alcoholic beverages and (4) is not under suspension or revocation for any other reason. Sec. 10 of L.B. 291 enacted in 1992

<sup>3</sup>These revocations are based upon a conviction under §39-669.08. Special Note: Revocations cannot run concurrently with jail sanctions.

<sup>4</sup>This action by the licensing agency is independent of any licensing action that may be taken by the courts. A person, who is subject to this administrative action, is not eligible for employment (hardship) driving privileges under §60-4,130.

STATE:  
General Reference:

NEVADA  
Nevada Revised Statutes

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of intoxicating liquor- §484.379(1)(a)
Illegal Per Se Law (BAC/BrAC Level):	0.10 <sup>182</sup> §484.0135 & 484.379(1)(b)
Presumption (BAC/BrAC Level):	0.10 §484.381(2)(c) & (4)(c)
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) A Controlled Substance, (2) a Combination of Intoxicating Liquor and a Controlled Substance or (3) Any Chemical, Poison, Organic Solvent and Any Compound or a Combination of These. §484.379(2)
Other:	For Commercial Motor Vehicle Operators, see below.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	Yes §484.382
Implied Consent Law:	
Arrest Required (Yes/No):	No <sup>3</sup> §484.383(1)
Implied Consent Law Applies to Drugs (Yes/No):	Yes §484.383(1)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) §484.389

This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more. §484.0135

Special Note: Sec. 484.381<sup>182</sup> provides for a presumption related to illegal per se. This provision states that if the chemical test indicates a BAC level of 0.10 or more such results shall be "presumed to be no less than the amount present at the time of the alleged violation." A Federal appellate court has held that this statutory provision does not create an unconstitutional mandatory conclusive presumption on its "face". However, a State trial court applied this presumption as if it were a mandatory conclusive presumption. Such application was held to be unconstitutional. *McLean v. Moran*, 963 F.2d 1306 (9th Cir. 1992). Only "reasonable grounds" are needed not an actual arrest.

DWI Offenses and Commercial Motor Vehicles (CMV)/Commercial Driver's Licenses (CDL): The State's Public Service Commission and Department of Motor Vehicles and Public Safety have promulgate regulations that adopt by reference 49 CFR Parts 383 and 392. Under 49 CFR §383.51, a person is "disqualified" from operating a CMV for 1 yr. (mand.) (3 yrs (mand.) if transporting hazardous materials) if, while driving a CMV, they (1) have a BAC/BrAC level of 0.04 or more, (2) are under the influence of alcohol or a controlled substance or (3) refuse to submit to a chemical test for an alcohol concentration. For either (1) a subsequent violation or (2) a combination of two or more violations of any of the above listed items, the "disqualification" is for life (mand.). Under 49 CFR §390.5, a CMV operator who has any "detectable" amount of alcohol in their system must be placed "out-of-service" for 24 hours. In addition, it is misdemeanor to violate a regulation. The sanctions for this offense are a jail term of not more than 6 mos and/or a fine of at least \$100 (mand.) but not more than \$1,000. Note: A person, who violates a regulation, may also be liable for a civil penalty which is not to exceed \$10,000. See §§483.908, 706.173, 706.756 & 706.771, NAC §706.247 and 49 USC App §2901 et seq.

Chemical Breath Tests for BAC/BrAC Level:  
(continued)

Other Information:

Note: A BAC chemical test via a blood sample may be given without consent if (1) there was a death or substantial bodily harm to another person or (2) the driver to be tested was convicted of a previous DWI offense w/in 7 yrs. See §484.383(3) & (8) and Ebarb v. State, Dept. of Motor Vehicles and Public Safety, 322 P.3d 1120 (Nev. 1991).

Chemical Tests of Other Substances for BAC Level  
Which Are Authorized Under the Implied Consent Law:

Blood:	Yes §484.383(1)
Urine:	Yes §484.383(1) <sup>1</sup>
Other:	Or other unspecified bodily substances §484.383(1)

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No
Anti-Plea Bargaining Statute (Yes/No):	Yes (Note: A DWI charge cannot be exchanged for a lesser charge unless there is no evidence to support such a DWI charge. §484.3792(3))
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes For a 3rd DWI and felony offs §§176.135, 484.3792(1)(c) & 484.3796 Special Note: For 1st offenders, a teacher of an (alc.) education course must evaluate the DWI offender to determine if such offender is an abuser of alcohol or drugs. The finding of this evaluation must be reported to the court. §484.3792(1)(a)(3)

Sanctions for Refusal to Submit to a Chemical Test:

<u>Refusal to Take a Preliminary Breath Test:</u>	
Criminal Sanctions (Fine/Jail):	None
Administrative Licensing Action (Susp/Rev):	Rev-90 dys §484.384(3)
Other:	None

<sup>1</sup>A urine test can only be requested under two conditions. (1) A driver has been arrested for an alcohol driving offense and it is determined that they have hemophilia or a heart condition which would exempt them from a blood test or (2) a driver has been arrested for a drug driving offense. §484.383(4), (6) & (7)

STATE:  
General Reference:

NEW JERSEY  
New Jersey Statutes Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of intoxicating liquor §39:4-50(a) See the Special Note below.
Illegal Per Se Law (BAC Level):	0.10 <sup>1,2,3</sup> §39:4-50(a) <u>Under 21 Years Old</u> 0.01 but less than 0.10 <sup>4</sup> §39:4-50.14
Presumption BAC Level:	None
Types of Drugs/Drugs and Alconol:	Under the influence of (1) A Narcotic (2) A Hallucinogenic Drug or (3) A Habit-Producing Drug §39:4-50(a)
Comment:	For Comm. Motor Vehicle Operators, see § 39:4-50.16

Chemical Breath Tests For BAC Level:

Preliminary Breath Test (a-1)	No
Implied Consent (a-2)	
Arrest Required (a-3)	Probably Yes Under §39:4-50.2(a) a driver's license can only be revoked when the refusal is based on an arrest. However, see §39:4-50.2 (a) where only "reasonable grounds" seems to be required.
Drugs (Yes/No)	No
Refusal to Submit to Chemical Test	
Admitted into Evidence:	Yes (Criminal Cases: State v. Stever, 527 A.2d 408 N.J. 1987)
Other Information:	(1) An "Involuntary" blood (not breath) sample may be obtained from a person who has been arrested for a DWI offense; i.e., a blood sample may be taken by "force". State v. Dyer, 473 A.2d 390 (N.J. 1984), and State v. Roemer, 483 A.2d 637 (N.J. Super. A.D. 1984) (2) Tests for alcohol shall be made on automobile drivers who survive traffic accidents fatal to others. §26:26-24 and State v. Figueroa, 515 A.2d 242 (N.J. Super. A.D. 1986), cert. den. 515 A.2d 204

Standard: Percent by weight of alcohol in the blood. §39:4-50(a)  
 In State v. Dowdle, 569 A.2d 242 (N.J. 1990), the N.J. Supreme Court held that breathalyzer results must be given "judicial notice". The court felt that this was in keeping with the legislature's policy of measuring alcohol in the brain for the purpose of determining whether a person was DWI. Comment: The practical end result of this decision was to in effect create a "judicial" illegal per se law based on BrAC; see the dissenting opinion.

<sup>1</sup>See State v. Lencini, 573 A.2d 464 (N.J. Super. A.D. 1990).

Special Note: Under separate statutory provisions, it is illegal for a person to drive a motor vehicle while under the influence of intoxicating liquor, any narcotic or any habit forming drug (1) on "vehicle crossings" (bridges and tunnels) operated by the Port of New York Authority, (2) on any "project" of the New Jersey Expressway Authority or (3) on any "project" of the New Jersey Turnpike Authority. §§27:120-37(6), 27:120-37, 27:23-25, 29:23-32, 32:1-154.2, 32:1-154.9 & 32:1-154.10. It is illegal to operate a motorized bicycle while under the influence of intoxicating liquor, any narcotic or any habit forming drug. §39:4-14.3g. The law provides that a violation of these provisions results in the same sanctions as for violating the regular DWI law. §39:4-50

<sup>2</sup>The only sanctions for this offense are community service and forfeiture of driving privileges.

Chemical Tests for Other Substances for BAC Level  
Which Are Authorized Under the Implied Consent Law:

Blood: No  
Urine: No  
Other: None

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No): No  
Anti-Plea Bargaining Statute (Yes/No): No  
Pre-Sentencing Investigation Law (PSI)  
(Yes/No): Yes (Alcohol screening) §39:4-50(b)

Sanctions for Refusal to Submit to a  
Chemical Test:

Refusal to Take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail): N/A  
Administrative Licensing Action  
(Susp/Rev): N/A  
Other: N/A

Refusal to Take Implied Consent  
Chemical Test:

Criminal Sanction (Fine/Jail): Fine-\$250 to \$500 §39:4-50.4a  
Administrative Licensing Action  
(Susp/Rev): 1st Refusal-Rev-6 mos (Mand); 2nd or sub  
refusal-Rev 2 yrs (Mand) §39:4-50.2 &  
39:4-50.4a  
Other: None

Sanctions Following a Conviction for a DWI Offense:

Criminal Sanctions: See the Special Note below.  
Imprisonment:  
Term (Day, Month, Years,  
Etc.): 1st off-Not more than 30 dys; 2nd off (w/n 10  
yrs of a first off)-48 cons hrs-90 dys; 3rd and  
subsequent offs (w/n 10 yrs of a second off)-Not  
less than 180 dys §39:4-50  
Mandatory Minimum Term: 1st off-(See Rehabilitation on p. 3-316.); 2nd  
off-48 cons hrs (See Rehabilitation on p.  
3-316.); 3rd and subsequent offs-90 dys<sup>1</sup> (See  
Rehabilitation on p. 3-316.)

<sup>1</sup>The law provides that the court may substitute no more than 90 of the 180 jail term for community service on a day-for-day basis. Consequently, a 3rd or subsequent DWI offender would still be subject to a mandatory jail term of at least 90 dys. §39:4-50(a)(3) and State v. Laurick, 575 A.2d 1340 (N.J. 1990)

Special Note: In State v. Hamm, 577 A.2d 1259 (N.J. 1990), the New Jersey Supreme Court noted that a DWI offense is not a "crime".

STATE:  
General Reference:

OKLAHOMA  
Oklahoma Statutes Annotated

Basic for a DWI Charge:

Standard DWI Offense:	(1) Under the influence of alcohol and (2) Impaired by the consumption of alcohol 47 §6751(A) & 11-302(A)(2)
Illegal Per Se Law (BAC/BrAC Level):	0.10 <sup>1</sup> 47 §6751(d) & 11-302(A)(1)
Presumption (BAC Level):	None
Types of Drugs, Drugs and Alcohol:	Under the influence of (1) Intoxicating Substances or (2) a combination of these and alcohol 47 §11-302(A)(3) & (4)
Other:	0.10 BAC level is also <u>prima facie</u> evidence that a person was under the influence of alcohol 47 §7551(c) >0.05 and <0.10 is evidence of Driving While Impaired 47 §756(b) For Commercial Motor Vehicle Operators, see below.

Chemical Breath Tests for BAC/BrAC Levels:

Preliminary Breath Test Law:	No
Implied Consent Law:	
Arrest Required (Yes/No):	Yes 47 §751(A)
Implied Consent Law Applies to Drugs (Yes/No):	Yes 47 §751(A)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) 47 §756
Other Information:	Note: (1) Under 47 §753, a mandatory chemical test may be ordered in situations where there is probable cause that a person has been operating a motor vehicle while DWI and such operation has caused either death or serious physical injury to another person. (2) Also, under 47 §10-104(B), a mandatory chemical for alcohol/drugs may be ordered in traffic accident situations where the driver (person to be tested) has been cited for a traffic offense.

This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more.

The impaired offense applies only to the use of alcohol (not other drugs). The sanctions given for driving while under the influence includes both alcohol and drug driving violations.

DWI Offenses and Commercial Motor Vehicles (CMV)/Commercial Driver's Licenses (CDL): A person is "disqualified" from operating a CMV for not less than 1 yr. (1 yr. mand.) (not less than 3 yrs (3 yrs mand.) if transporting hazardous materials), if while operating a CMV they (1) have a BAC/BrAC level of 0.04 or more, (2) are under the influence of alcohol or an intoxicating substance or (2) refuse to submit to a chemical test for an alcohol concentration. For either (1) a second "conviction" or (2) a combination of two "convictions" of any of the above listed items, the "disqualification" is for life (10 yrs mand.). See 47 §6-205.2.

Chemical Tests of Other Substances for BAC Level  
Which Are Authorized Under the Implied Consent Law:

Blood: Yes (for alcohol and intoxicating substances)  
47 §751(A)  
Urine: Yes (for intoxicating substances only) 47  
§751(A)  
Other: Saliva (for intoxicating substances only) 47  
§751(A)

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No): No  
Anti-Plea Bargaining Statute (Yes/No): No  
Pre-Sentencing Investigation Law (PSI)  
(Yes/No): Yes (2nd and subsequent offs) 22 §982

Sanctions for Refusal to Submit to a  
Chemical Test:

Refusal to Take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail): N/A  
Administrative Licensing Action  
(Susp/Rev): N/A  
Other: N/A

Refusal to Take Implied Consent  
Chemical Test:

Criminal Sanction (Fine/Jail): None  
Administrative Licensing Action  
(Susp/Rev): 1st Refusal-Rev-180 dys (90 dys mandatory)<sup>1</sup>; 2nd  
Refusal (w/n 5 yrs)-Rev.-1 yr (mandatory); Sub.  
Refusal (w/n 5 yrs)-Rev.-3 yrs (mandatory) 47  
§§ 6-205.1, 6-211(i), 753, 754.1 & 755  
See Footnote No. 2 on p. 3-374.  
Other: None

Sanctions Following a Conviction for a DWI Offense:

Criminal Sanctions:

Imprisonment:

Term (Day, Month, Years,  
Etc.):

Driving While Under the Influence/Illegal Per Se  
1st Off (Misd)-10 dys to 1 yr; 2nd & subsequent  
offs (w/n 10 yrs-felony)-1 yr to 5 yrs 47  
§11-902 Personal Injury Accident (Driving While  
Under the Influence/Illegal Per Se)-1st Off  
(Misd)-90 dys to 1 yr; 2nd Off (felony)-1 to 5  
yrs 47 §11-904(A) Great Bodily Harm (Driving  
While Under the Influence/Illegal Per Se)  
(felony)-not more than 5 yrs 47 §904(B)

<sup>1</sup>A restricted hardship license is available after the mandatory 90 day period.

STATE:  
General Reference:

SOUTH DAKOTA  
South Dakota Codified Laws

Basis for a DWI Charge:

Standard DWI Offense: Under the influence of an alcoholic beverage §32-23-1(2)  
Illegal Per Se Law (BAC Level): 0.10' §32-23-1(1)  
Presumption (BAC Level): 0.10' §32-23-7 (Note: §32-23-7 applies this presumption to the veh homicide off.  
Types of Drugs/Drugs and Alcohol: Under the influence of (1) Any Substance, (2) Any Controlled Drug, (3) Marijuana or (4) a Combination of These Substances and an Alcoholic Beverage §32-23-1(3) & (4)  
Other: For Commercial Motor Vehicle Operators, see ch. 3-431.

Chemical Breath Tests for BAC Level:

Preliminary Breath Test Law: Yes §32-23-1.2  
Implied Consent Law:  
Arrest Required (Yes/No): Yes §32-23-10  
Implied Consent Law Applies to Drugs (Yes/No): Yes §32-23-10  
Refusal to Submit to Chemical Test Admitted into Evidence: Yes §§19-13-23.1 & 32-23-10.1<sup>2</sup> (Criminal Cases)  
Other Information: Chemical test required for persons who have been arrested for a third or subsequent DWI offense which constitutes a felony. "Force" may be used to obtain a blood sample. §32-23-10. State v. Heinrich, 449 N.W.2d 25 (S.D. 1989), State v. Lanier, 452 N.W.2d 144 (S.D. 1990), and State v. Sickler, 488 N.W.2d 70 (S.D. 1992).

Chemical Tests of Other Substances for BAC Level:  
Which Are Authorized Under the Implied Consent Law:

Blood: Yes §32-23-10  
Urine: No §32-23-10  
Other: "Other bodily substances" §32-23-10

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No): No  
Anti-Plea Bargaining Statute (Yes/No): No (Note: An illegal per se charge may be reduced or dismissed only when written reasons for such have been filed with the court. §32-23-1.3)

<sup>1</sup>Based on percent by weight of alcohol in the blood. However, under §32-2-7, there is a provision that "[p]ercent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 1.0 cubic centimeters of whole blood or 2100 cubic centimeters of deep lung breath."

<sup>2</sup>This statute was held constitutional in South Dakota v. Neville, 459 U.S. 553 (1981).

Adjudication of DWI Charges: (continued)

Pre-Sentencing Investigation Law (PSI)  
(Yes/No):

Yes Limited If the defendant's BAC level is 0.17 or more, the court must require them to undergo an evaluation to determine if they are addicted to alcohol. §32-33-23 Note: The courts have general authority to order discretionary pre-sentence investigation reports. §23A-27-5

Sanctions for Refusal to Submit to a Chemical Test:

Refusal to Take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail): None  
Administrative Licensing Action (Susp/Rev): None  
Other: None

Refusal to Take Implied Consent Chemical Test:

Criminal Sanction (Fine/Jail): None  
Administrative Licensing Action (Susp/Rev): Rev 1 yr<sup>1</sup> (A restricted hardship license is available.) §32-23-11  
Other: None

Sanctions Following a Conviction for a DWI Offense:

Criminal Sanctions:

Imprisonment:

Term (Day, Month, Years, Etc.):

1st off C1 1 Misd-1 yr (county jail); 2nd off (w/n 5 yrs) C1 1 Misd-1 yr (county jail); 3rd off C1 6 Felony (w/n 5 yrs)-Not more than 2 yrs (State penitentiary); 4th & sub. off (w/n 5 yrs) C1 5 Felony-Not more than 5 yrs (State penitentiary) §§22-6-1, 22-6-2, 32-23-2, 32-23-3, 32-23-4 & 32-23-4.1

Mandatory Minimum Term:

None

Fine:

Amount (\$ Range):

1st off-\$1,000; 2nd off (w/n 5 yrs)-\$1,000; 3rd off (w/n 5 yrs)-\$2,000; 4th & sub. off (w/n 5 yrs)-Not more than \$5,000

Mandatory Min. Fine (\$):

None

<sup>1</sup>Under §32-23-11.1, a driver's license is not subject to revocation for refusal to submit to a chemical test under the implied consent law if either (1) the driver pleads guilty to a DWI offense or (2) the DWI charge is dismissed prior a hearing on the refusal and the person is not convicted of a lesser charge or, if a hearing is not requested, prior to the revocation being ordered.

STATE:  
General Reference:

UTAH  
Utah Code Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of alcohol §41-6-44(1)(a)
Illegal Per Se Law (BAC/BrAC Level):	0.08 <sup>1</sup> §41-6-44(1)(a) & (2)
Presumption (BAC Level):	None
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Any Drug or (2) a Combination of Any Drug and Alcohol §41-6-44(1)(a)
Other:	For Commercial Motor Vehicle Operators, see p. 3-461.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	No
Implied Consent Law:	
Arrest Required (Yes/No):	Yes §41-6-44.10(2)
Implied Consent Law Applies to Drugs (Yes/No):	Yes §41-6-44.10(1)
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal and Civil Cases) §41-6-44.10(3)
Other Information:	A driver may be compelled to submit to a chemical test if they have been placed under arrest either (1) for a DWI offense and there is reason to believe that another person may die as a result of the offense or (2) for a vehicle homicide alcohol related offense. §76-5-207(5)(b) & (7)(a)

Chemical Tests of Other Substances for BAC Level Which Are Authorized Under the Implied Consent Law:

Blood:	Yes §41-6-44.10
Urine:	Yes §41-6-44.10
Other:	None

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No (Note: A Magistrate may not grant diversion in a DWI case. §77-2-9)
Anti-Plea Bargaining Statute (Yes/No):	No (Note: If the defendant pleads guilty or <u>nolo contendere</u> to reckless driving as a substitute for a DWI charge, the prosecution must state for the record whether alcohol or drugs were related to the pleaded off. §41-6-44(10))
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes §41-6-44(4) & (5) (Assessment)

<sup>1</sup>This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.08 or more.

Sanctions for Refusal to Submit to a Chemical Test:

Refusal to Take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail):	N/A
Administrative Licensing Action (Susp/Rev):	N/A
Other:	N/A

Refusal to Take Implied Consent:

Chemical Test:

Criminal Sanction (Fine/Jail):	None
Administrative Licensing Action (Susp/Rev):	Rev for 1 yr <sup>1</sup> Mandatory §41-6-14.10(2)(b) (Note: No hardship license may be issued for revs based on a test refusal. §41-2-19(d))
Other:	None

Sanctions Following a Conviction for a DWI Offense:

Criminal Sanctions:

Imprisonment:

Term (Day, Month, Years, Etc.):

1st off and 2nd off (w/n 5 yrs)-Class B misd.- not more than 6 mos; 3rd & sub off (w/n 5 yrs) if one or more of the previous offs occurred prior to 4/23/90-Class B misd. - not more than 6 mos; 3rd off (w/n 5 yrs) if two of the previous offs occurred after 4/23/90-Class A misd. - not more than 1 yr; 4th & sub off (w/n 5 yrs) if the three previous offs occurred after 4/23/90-3rd Degree felony - not more than 5 yrs  
A DWI off--where there is an injury related to negligent action-Class A misd.- not more than 1 yr §§41-6-14(3)(a), 76-3-202(3) & 76-3-204  
1st off-48 cons hrs; 2nd off (w/n 5 yrs)-240 cons hrs; subsequent off (w/n 5 yrs)-720 hrs  
DWI related injury off-48 cons hrs

Mandatory Minimum Term:

<sup>1</sup>This sanction also applies to persons under 21 years old who refuse to submit to a chemical test to determine if they have violated §41-6-14.1(1). This section provides for administrative (licensing) actions against such persons who drive a vehicle with any amount of alcohol in their body.

<sup>2</sup>This mandatory sanction (i.e., jail or community service alternative) may not apply to 3rd offenses (w/n 5 yrs) if two of the previous offs occurred after 4/23/90 and to 4th & sub offenses (w/n 5 yrs) if the three previous offs occurred after 4/23/90. The law provides that for these offenses "[e]nrollment in and completion of a chemical dependency rehabilitation program approved by the court may be a sentencing alternative to incarceration or community service if the program provides intensive care or inpatient treatment and long-term closely supervised follow through after the treatment." §41-6-14(6)(c)(II) & (7)(c)

STATE:  
General Reference:

WASHINGTON  
Revised Code of Washington Annotated

Basis for a DWI Charge:

Standard DWI Offense:	Under the influence of or affected by intoxicating liquor §§46.61.502(3) & 46.61.504(3)
Illegal Per Se Law (BAC/BrAC Level):	0.10 <sup>1</sup> §§46.61.502(1) & (2) and 46.61.504(1) & (2)
Presumption (BAC Level):	None
Types of Drugs/Drugs and Alcohol:	Under the influence of (1) Any Drug or (2) a Combination of Intoxicating Liquor and Any Drug §§46.61.502(3) & (4) and 46.61.504(3) & (4)
Other:	For Commercial Motor Vehicle Operators, see p. 3-450.

Chemical Breath Tests for BAC/BrAC Level:

Preliminary Breath Test Law:	No
Implied Consent Law:	
Arrest Required (Yes/No):	Yes §46-20-308
Implied Consent Law Applies to Drugs (Yes/No):	No <sup>2</sup>
Refusal to Submit to Chemical Test Admitted into Evidence:	Yes (Criminal Cases) §46.61.517 <sup>2</sup>
Other Information:	Special Note: A person may be administered either a breath or blood test without their consent, if they have been arrested for either (1) vehicle homicide, (2) vehicle assault or (3) DWI where there has been an injury related accident which may result in death. §46.20.308 <sup>3</sup> & State v. Schulze, 804 P.2d 555 (Wash. 1991)

Chemical Tests of Other Substances for BAC Level Which Are Authorized Under the Implied Consent Law:

Blood:	Yes
Urine:	No
Other:	None

<sup>1</sup>This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration level of 0.10 or more.

<sup>2</sup>See State v. Zwicker, 713 P.2d 1101 (Wash. 1986), which limited such evidence to situations where the defendant initially raises the issue of a blood alcohol test by contesting the credibility or competence of police procedures.

<sup>3</sup>Under §46.20.308(2), if there is an injury likely to cause death, a person may be compelled to submit to a test for drugs as well as for alcohol.

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No):	No <sup>1</sup>
Anti-Plea Bargaining Statute (Yes/No):	No <sup>1</sup>
Pre-Sentencing Investigation Law (PSI) (Yes/No):	Yes Permissive authorization, but not mandatory; see §46.61.515.

Sanctions for Refusal to Submit to a  
Chemical Test:

Refusal to Take a Preliminary Breath Test:

Criminal Sanctions (Fine/Jail):	N/A
Administrative Licensing Action (Susp/Rev):	N/A
Other:	N/A

Refusal to Take Implied Consent

Chemical Test:

Criminal Sanction (Fine/Jail):	None
Administrative Licensing Action (Susp/Rev):	<u>1st refusal</u> -Rev for 1 yr (Mandatory); <u>2nd refusal (w/n 5 yrs)</u> Rev for 2 yrs (Mandatory) §§46.20.308 and 46.20.311(2)
Other:	None

Sanctions Following a Conviction for a DWI Offense:

Criminal Sanctions:

Imprisonment:

Term (Day, Month, Years,  
Etc.):

1st off - 24 hrs - 1 yr; 2nd and Subsequent off  
(w/n 5 yrs) - 7 dys - 1 yr; 2nd and Subsequent  
off but offender has no license or because their  
license was either suspended or revoked - 90 dys  
- 1 yr Man Assault (Drunk driving related  
injury C; C felony) - Not more than 5 yrs  
§§9A.20.021(1)(c), 46.61.502, .504, .515, .522  
See Miscellaneous Sanctions on p. 3-496.

1st off - 24 cons hrs<sup>1&2</sup>; 2nd and Subsequent  
offs (w/n 5 yrs) - 7 dys<sup>2&3</sup>; 2nd and Subsequent  
off but offender has no license or because their  
license was either suspended or revoked - 90  
dys See Miscellaneous Sanctions on p. 3-496.

Mandatory Minimum Term:

<sup>1</sup>The State has a deferred prosecution program for DWI offenses. A person is eligible for this program only once in every five (5) years. The program provides for alcohol treatment for a two year period. Upon successful completion of the program, the court shall dismiss the charges pending against the defendant. §10.05.010 et seq.

<sup>2</sup>May be suspended only if jail would impose a risk to defendant's physical or mental well-being.

<sup>3</sup>With 48 con. hrs. §46.61.515(1)

**Special Note:** The Washington Supreme Court has held that DWI offenses are not felonies. State v. Elgin, 825 P.2d 314 (Wash. 1992)

**HB**

**454**

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 18, 1994

The Honorable Robin Taylor  
Chair, Senate Judiciary  
Room 30  
State Capitol  
Juneau, AK 99801-1182

Re: FY 94 Oil and Gas  
litigation supplemental  
HB 454

Dear Senator Taylor:

The Department of Law urgently requests Judiciary Committee approval of a supplemental appropriation for oil and gas litigation in FY 94 in the amount of \$18,450,000. The appropriation is contained in HB 454 now pending in your committee.

The department is now in the trial preparation stage for four major cases. Two of these cases involve royalty matters set for trial in the spring of 1995. The remaining cases are tax matters set for formal administrative proceedings. All of these cases are complex, involving substantial amounts of time and expense to prepare. The legislature partially funded the FY 1994 oil and gas special litigation budget request unit by appropriating \$10.358 million (l. 11-12, sec. 25, ch. 65, SLA 1993) of the estimated \$25 million needed to finance a full year of litigation activities. Because of the expense of document collection, production and organization, the need to take numerous depositions, and the employment and preparation of experts for all of these cases, the original appropriation has been fully expended.

Consequently, it is imperative that a special supplemental appropriation bill be introduced for consideration by the legislature at the earliest possible time. There is precedent for expedited consideration of an oil and gas litigation-related supplemental appropriation (see, e.g., ch. 2, SLA 1983; ch. 1, SLA 1981). Without early enactment of a supplemental appropriation, we will be forced to shut down our litigation effort at the most crucial pretrial period. Our efforts in the royalty cases are being driven by scheduling orders imposed by the Superior Court. Our efforts in the tax cases are being driven by the policy of the administration to resolve long standing tax disputes that may add significantly to state revenues.

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE (907) 269-5100  
FAX: (907) 276-3697

KEY BANK BUILDING  
100 CUSHMAN ST., SUITE 400  
FAIRBANKS, ALASKA 99701-4679  
PHONE (907) 451-2511  
FAX: (907) 451-2546

P.O. BOX 110300-DIAMOND COURT HOUSE  
JUNEAU, ALASKA 99911-0300  
PHONE (907) 465-3600  
FAX: (907) 465-6735

The supplemental will complete funding in FY 94 for the following major activities:

1. Royalty Cases.

In re ANS Royalty litigation (formerly known as State v. Amerada Hess). This case is scheduled for trial beginning in Spring 1995. The case involves the validity and method of calculation of charges assessed by North Slope producers for the state's royalty oil produced in the form of natural gas liquids. We are incurring significant expense to process over 2,500,000 documents produced by our opponents during discovery. We are also conducting oral depositions of persons who may provide relevant evidence concerning the state or the producer's case. Experts were hired to prepare reports to support the cases of the respective parties. These reports were exchanged with our opponents and we must now depose these experts. In order to be ready for trial, it is crucial to continue funding these activities.

MAPCO. The department is also deeply committed to prosecuting the state's claims against MAPCO for a retroactive price adjustment under certain royalty oil contracts. This case is also scheduled for a Spring 1995 trial. The recovery of over \$100 million is at stake in this case. All other royalty oil purchasers have either admitted liability or settled for substantially all of the state's claims. MAPCO is alone in its denial of liability and is defending this case in a manner which appears to be calculated to cost the state the maximum amount to obtain a judgment. Again, the continuation of funding is crucial to keep up the pace set by MAPCO and the Superior Court.

2. Oil and gas tax cases.

Tax proceedings conducted before the Department of Revenue are confidential. Accordingly, the department is unable to disclose the specific taxpayers, issues, or amounts at issue. It is expected that the cases currently being developed will require the processing of millions of documents and the employment of several experts. Development of these cases is contingent upon additional funding since existing appropriations are fully committed.

3. TAPS cases.

TAPS Corrosion Case. The TAPS corrosion case between the state and the TAPS owners is stayed to permit the parties to undertake a cooperative corrosion control program. The parties hope that the program will provide a basis for settlement of the dispute. The department is expending substantial amounts through

The Honorable Robin Taylor  
Chair, Senate Judiciary

March 18, 1994  
Page 3

outside counsel to support the cooperative program. It is possible that the program will either continue and the case will settle, or the parties may abandon the cooperative program and return to litigation. If the program continues, the state will incur substantial sums to provide expert support for the program. If the case returns to litigation, the costs of preparing for hearing before the Federal Energy Regulatory Commission could be substantial. Presently, we expect that the cooperative program will be extended by FERC. However, we must be prepared for the other eventuality.

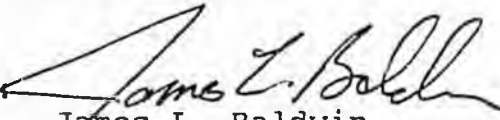
TAPS audit. The department gave the TAPS owners notice of the state's right to audit for tariff review purposes. An audit was last done through 1986. The audit may provide a basis for questioning substantial expenses recovered by the owners through the TAPS tariff. It is expected that the legislature and public will be critical of the time lag since the last audit. It is imperative that the administration anticipate this criticism by moving forward now with the audit. The shortfall in available appropriations will delay the audit. The main audit firm has expressed a reluctance to begin in earnest without assurance of funding. Additionally, Alyeska appears prepared to litigate our right of access to their documents. The litigation will add an unanticipated expense to our audit effort.

In closing, please let me stress the importance of enacting an early supplemental. A temporary cessation of trial preparation would be required in the absence of an early supplemental. This will have a devastating effect on the state's oil and gas litigation. Our trial teams would, for the most part, be disbanded. Reconstruction of the teams later would be difficult and, in the long term, more expensive for the state than continuing our current level of activity. The emergency measures described here would send a signal of weakness to the producers. A shutdown now would make it far more difficult (if not impossible) to arrive at settlements that are acceptable to the state.

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By



James L. Baldwin  
Assistant Attorney General

JLB:tg

The Honorable Robin Taylor  
Chair, Senate Judiciary

March 18, 1994  
Page 4

cc: The Honorable Steve Frank  
Co-Chair Senate Finance

Bruce M. Botelho  
Attorney General

Dick Pegues, Director  
Administrative Services Division

**HB**

**459**

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101


130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

### MEMORANDUM

March 14, 1994

**SUBJECT:** Sectional Summary of CSHB 459( ). (Minimum wage and overtime compensation claims)

**TO:** Representative Eldon Mulder

**FROM:** Teresa B. Cramer   
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 applies the exceptions enacted in section 3 of the bill to the general rule established in the statute that employers who violate the overtime wage or minimum wage requirements are liable for liquidated damages in the amount of the unpaid minimum wage or overtime compensation.

Sec. 2 permits the court to award attorney fees to the prevailing party, as determined by court rule, rather than only providing for attorney fees for a prevailing plaintiff.

Sec. 3 adds new provisions to permit the court to decline to award liquidated damages or to award an amount less than the amount required under AS 23.10.110(a), which is amended by sec. 1 of this bill. The court may do so if the employer shows to the satisfaction of the court that the employer acted in good faith and that the employer had reasonable grounds for believing that it was not violating the minimum wage or overtime requirements. This waiver does not apply to an action brought by the Commissioner of Labor.

Under subsection (e), the commissioner is permitted to supervise the payment of unpaid minimum wage or overtime claims including settlements. Under bill Sec. 4(a), subsection (e) applies to agreements entered into on or after the effective date of the Act.

Representative Eldon Mulder  
March 14, 1994  
Page 2

Subsection (f) permits an employee to waive the right to liquidated damages in a written settlement agreement with the employer. The settlement must meet standards listed in the subsection. Under bill Sec. 4(b), subsection (f) applies to written agreements entered into on or after the effective date of the Act.

Sec. 4 addresses how to apply the provisions of the Act. As noted in the discussion above, Sec. 4(a) and (b) apply the settlement provisions to agreements entered into on or after the date the Act takes effect. Under Sec. 4(c), to the extent constitutionally permitted, the rest of the Act applies to actions in which a final judgement has not been entered on the date the Act takes effect.

TC:pl  
94-201.plm

# FISCAL NOTE

STATE OF ALASKA  
1994 LEGISLATIVE SESSION

BILL NO : CSHB 459 (STA)

Revision Date: \_\_\_\_\_

Department Affected: Labor

Title: Damages and attorney fees for  
unpaid wages

BRU: Labor Standards & Safety

Component: Wage & Hour

Sponsor: House Labor & Commerce

Requestor: House Judiciary

COMPONENT SERIAL NO. 345

**EXPENDITURES/REVENUES:**

(Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
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**FUNDING:**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

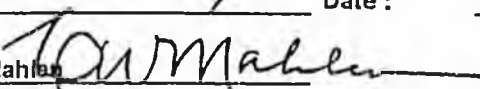
**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: \$ None

**ANALYSIS:** (Attach a separate page if necessary)

Prepared by: Donald G. Study, CSP, Director  Phone: 465-6003  
Division: Labor Standards & Safety Date: 3/16/94

Approved by Commissioner: Charles W. Mahler   
Agency: Department of Labor 3/16/94

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LEGISLATIVE OFFICE  
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FISCAL NOTE

## Sponsor Statement CSHB 459 (JUD) am

### OVERVIEW

This legislation addresses the awarding of punitive damages in claims of underpaid overtime compensation or statutory minimum wages under the Alaska Wage and Hour Act (AWHA). State statute imposes the payment of unpaid minimum wages or overtime compensation to an employee by an employer who has violated provisions of the AWHA. In addition to this, the employer may be liable for mandatory liquidated damages of an equal amount (AS 23.10.110(a)).

The Alaska Supreme Court in McKeown v. Kinney Shoe Corp., 820 P.2d 1068 (Alaska 1991), ruled that liquidated damages are **mandatory** and that any individual settlements out of court that did not include liquidated damages were invalid.

Prior to the Kinney Shoe ruling, an employee with a claim for underpaid overtime or minimum wages had a few options for redress. One, they could file complaint with the Alaska Dept. of Labor, who was able to negotiate a settlement. Two, the employer could attempt to reach a private settlement with the employer in question. In either of these cases, a settlement could be reached for an amount below full liquidated damages. Finally, if a settlement could not be reached in the above options, the case could be taken to court, where liquidated damages would be awarded in full if the case was found for the plaintiff.

As the law stands currently, an employer who is in violation of the state's minimum wage or overtime compensation laws is automatically liable for liquidated damages, regardless of the circumstances. Though this is intended as a deterrent to the employer in these instances, it creates an imbalance in certain situations. Under the current law, an employer who makes an "honest mistake" is punished as severely as an employer who knowingly violates the law. In these situations, the employer either takes his case to court, facing the possibility of paying full liquidated damages plus court costs or settling out of court for the claim plus full liquidated damages.

The Federal Labor Standards Act, upon which the AWhA is based, contains identical language to AS 23.10.110(a), but also contains the following language:

. . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing his act or omission was not in violation of the Fair Labor Standards Act, . . . the court may in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in [29 U.S. Code § 216].

29 U.S. Code § 260

This additional language in the FLSA creates some flexibility for employers when an honest mistake is made. The discretion is left to the courts to decide to award partial or no liquidated damages where the employer shows it acted in good faith and it had a reasonable basis for believing it was not violating the law.

CSHB 459 (JUD) am also adds a provision in Section 2 that provides the payment of court costs and attorney fees to the prevailing party in a claim decided by the court. Previous statute only provided payment of these costs to the plaintiff (employee) in these cases. This change would help to prevent erroneous claims against an employer from being brought to the court. If the Commissioner of Labor was the prevailing party in an action under this section, any court or attorney fees awarded would be remitted to the Division of Revenue for deposit into the General Fund. The House State Affairs committee added some further clarification to this provision in their committee substitute, by adding the word "recovered." (Page 1, line 14 now reads ". . . commissioner shall remit the recovered attorney fees to the Dept. of Revenue.")

CSHB 459 (JUD) am would also provide some protection to the employee during a compensation claim in settlements that are not supervised by the Dept. of Labor or the courts. In Section 3 (f), an employee may enter into a written settlement agreement with the employer waiving the right to receive full or any liquidated damages. CSHB 459 (JUD) requires that this settlement meets five qualifications: (1) the settlement is written in a manner that is understood by the employee; (2) the employee specifically waives the rights or claims in AS 23.10110(a); (3) advises the employee to consult with an attorney or with the Dept. of Labor

before entering the agreement; (4) allows the employee seven days to consider the settlement and (5) gives the employee 5 days after they enter into the settlement to revoke agreement.

The goal of HB 459 is to change the state standards regarding the awarding of liquidated damages to be congruent with the federal standards and encourage the settlement of these disputes outside of the courts. This results in a more equitable situation for both parties; protection is still provided to the employee and flexibility is afforded to the employer who makes a mistake in good faith, providing they meet the burden of proof.

# DAVIS WRIGHT TREMAINE

LAW OFFICES

SUITE 1450 • 550 WEST 7TH AVENUE • ANCHORAGE, ALASKA 99501  
(907) 257-5300

## MEMORANDUM

TO: Alaskan Employers

FROM: Parry Grover

DATE: February 9, 1994

RE: Analysis of Proposed House Bill Relating to  
Liquidated Damages and Attorney's Fees for Minimum  
Wage and Overtime Compensation Claims

Several questions have been raised regarding the impact of the proposed House Bill. This Memorandum responds to those questions:

1. If the Bill is Enacted Into Law, Won't That Make It More Difficult For Employees and Former Employees With Small Claims to Recover the Wages Due Them?

No. The majority of small minimum wage and overtime claims are collected by the Alaska Department of Labor, Wage and Hour Administration. Section 3(e) of the Bill simply restores to the Commissioner discretion to settle those claims with or without liquidated damages. The Commissioner had that discretion prior to McKeown vs. Kinney Shoe Corp., 280 P.2d 1068 (Alaska 1991). The Commissioner is under no obligation to waive or reduce liquidated damages when collecting such claims on behalf of present or former employees. The Commissioner may accept assignment of claims up to \$5,000. A.S. 23.05.230(c).

2. If Section 3(d) is Enacted Into Law, Won't It Become It Easy For Employers to Avoid Payment of Overtime Compensation and Liquidated Damages?

No. The liquidated damages penalty built into A.S. 23.10.110(a) will remain the law of Alaska. Any employer who fails to pay minimum wages or overtime compensation when due will be required to make those payments and, in most cases, liquidated damages, court costs and attorneys' fees too. Only those employers who prove to the satisfaction of the court that they acted reasonably and in the good faith belief the minimum wage or overtime compensation was not due will be eligible to avoid an assessment of liquidated damages. Even then, the court will have

COMMONLY ASKED  
QUESTIONS

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WASHINGTON, D.C.

discretion to award partial or full liquidated damages, as the circumstances warrant.

Section 3(d) of the Bill is limited to private claims filed in court, i.e., not those enforced by the Commissioner. The experience of my office in defending cases of this type is that the typical plaintiff is a salaried, mid-level manager or supervisor. Typical overtime claims run into the tens of thousands of dollars. Minimum wage cases are rare in Alaska.

The decision of the Alaska Supreme Court in Bobich v. Stewart, 843 P.2d 1232 (Alaska 1992), is typical of private overtime pay litigation in Alaska today. In that case, the employees, Mr. and Mrs. Stewart, managed the Dimond Mini-Storage facility in Anchorage. The owners paid them on a salaried basis and treated them as exempt employees. The Stewarts convinced a jury they were not exempt employees and were entitled to overtime compensation. The jury awarded the Stewarts some \$45,133 in overtime pay for a two-year period, which the court doubled as mandatory liquidated damages pursuant to A.S. 23.10.110(a). The court awarded another \$11,672 in prejudgment interest and almost full attorney's fees totaling \$52,068. The Stewarts' total recovery exceeded \$154,000, which the Supreme Court affirmed on appeal.

Faced with the potential of such losses, we believe reasonable employers will continue to have very strong incentives to abide by the Alaska Wage and Hour Act and to enter into reasonable settlements, where they are permitted to do so.

3. Why is this a problem now? Isn't It Enough To Give The Commissioner Discretion to Settle Wage Claims?

Section 3(e) of the Bill will restore the Commissioner to the authority he had prior to Kinney Shoe to settle wage claims. Section 3(e) is not sufficient by itself, however, because the Commissioner has jurisdiction only to enforce claims up to \$5,000. Many larger claims are litigated by the parties in the courts without the Commissioner's involvement. Section 3(e) of the Bill does not address those claims.

The Bill also is necessary because of the recent upswing in Wage and Hour Act litigation in Alaska. If my firm's experience is typical -- and I believe it is -- we presently see more large Wage and Hour Act cases filed each year than we used to see in the entire mid-1980s. These cases have come into vogue with the plaintiff's bar because of potentially large recoveries, mandatory liquidated damages, and the availability of virtually full attorney's fees and court costs. The Kinney Shoe decision exacerbated this situation by declaring private settlements "void."

It seems anomalous for Alaska law to permit employees to enter into private settlements of wrongful discharge and employment discrimination cases, but not Wage and Hour Act cases. The Bill will have the salutary effect of allowing private settlements. And only those employers who can prove to the satisfaction of the court they acted reasonably and in good faith will have any hope of avoiding an assessment of full liquidated damages.

4. How Does Alaska's Liquidated Damages Statute, A.S. 23.10.110(a), Compare With the Laws of Other States?

I have discussed the liquidated damages provision in the Alaska Wage and Hour Act with knowledgeable attorneys and labor relations consultants in several other states. The strong consensus is that Alaska's liquidated damages provision is more stringent than similar statutes in other states.

By way of illustration, each of the other West Coast states has liquidated damages laws more like the Bill than Alaska's present liquidated damages law. Liquidated damages are not mandatory in every case, as they are in Alaska, in these states:

Washington. Washington law allows employees to recover liquidated damages where the employer violates its overtime compensation act "willfully and within intent to deprive the employee of any part of his wages." See RCW 49.52.050(1) & (2). The Supreme Court of Washington has interpreted the willful requirement to mean that nonpayment must be:

the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment.

Chelan County Deputy Sheriffs' Assn vs. City of Airway Heights, 109 Wn.2d 282, 300, 745 P.2d 1 (1987).

Oregon. In Oregon, an employee may recover liquidated damages for non-payment of overtime compensation as provided under the federal Fair Labor Standards Act (FLSA). A former employee may recover the greater of one month's pay as liquidated damages or the liquidated damages recoverable under the FLSA. CRS 652.150. In either case, the federal good faith and reasonable basis defense is available to the employer as is proposed in section 3(d) of the Bill.

California. California law also permits recovery of liquidated damages in wage and hour act cases. However, Section 1194.2(b) of the California Labor Code is virtually identical to section 3(d) of the Bill. It provides that California courts may

refuse to award liquidated damages or award any amount up to full liquidated damages

if the employer demonstrates that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not in violation of any provision of the Labor Code.

In short, Alaska presently treats its employers more harshly than its West Coast sister states by making liquidated damages mandatory in every case, regardless of the circumstances. The Bill is a corrective measure which will bring Alaska into the mainstream on the issue of liquidated damages without undermining the strong incentives employers have for compliance with the Alaska Wage and Hour Act.

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