

SENATE BILL REPORT

E2SHB 1276

As Reported by Senate Committee On:
Law & Justice, March 31, 2015

Title: An act relating to impaired driving.

Brief Description: Concerning impaired driving.

Sponsors: House Committee on General Government & Information Technology (originally sponsored by Representatives Klippert, Goodman, Hayes, Orwall, Moscoso, Pettigrew, Zeiger, Kilduff and Fey).

Brief History: Passed House: 3/06/15, 94-4.

Committee Activity: Law & Justice: 3/17/15, 3/31/15 [DPA-WM].

Brief Summary of Engrossed Second Substitute Bill (As Amended by Senate)

- The court must notify the Department of Licensing (DOL) in instances where a defendant is required to use an ignition interlock device (IID) and when a restriction is lifted.
- The provision is eliminated that prohibits an IID applicant from appealing a license revocation.
- It is a traffic infraction to have an open container of marijuana in the main compartment of a vehicle while on a public roadway.
- Driving under the influence (DUI) and physical control of a motor vehicle while under the influence of intoxicating liquor or any drug (PC) are felonies, ranked at level IV on the sentencing grid upon the fourth, instead of the fifth, DUI or PC offense.
- Forensic phlebotomists are regulated by the Department of Health in consultation with the the Washington Criminal Justice Training Commission (WCJTC).
- It is clarified that a court may remove an offender from the 24/7 program at any time for non-compliance.

SENATE COMMITTEE ON LAW & JUSTICE

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.

Signed by Senators Padden, Chair; O'Ban, Vice Chair; Pedersen, Ranking Minority Member; Darneille, Kohl-Welles, Pearson and Roach.

Staff: Aldo Melchiori (786-7439)

Background: Ignition Interlocks. *Pretrial Conditions of Release.* As a condition of release from custody before arraignment or trial, a defendant charged with a driving under the influence (DUI) offense, who has a prior DUI-related offense, must be ordered to have a functioning IID installed on the defendant's vehicle with proof filed with the court within five business days of the date of release, or comply with the 24/7 Sobriety Program, or both. A court must authorize the removal of the IID upon acquittal or dismissal of charges.

Liability. If, as part of the person's judgment and sentence, a person is required to install an IID on all motor vehicles operated by the person and the person is under the jurisdiction of the municipality or county probation or supervision department, the probation or supervision department must verify the installation of an IID. The county probation or supervision department satisfies the requirement to verify installation if it receives a written verification by an ignition interlock company stating that it has installed a device on a vehicle owned or operated by the person. The municipality or county has no further obligation to supervise the use of the device by the person and is not civilly liable for any injuries or damages caused by the person for failing to use a device or for DUI.

Ignition Interlock License. Any person with a state of Washington driver's license who is convicted of a DUI offense or has their license suspended or revoked for a DUI or PC, or vehicular assault or vehicular homicide while under the influence of alcohol or drugs offense, can apply for an ignition interlock driver's license (IIDL), which allows the licensee to lawfully operate a vehicle during the revocation.

Hearing and Appeal. A licensee who obtains an IIDL is precluded from asserting the statutory right to judicial appeal from the administrative decision imposing the revocation. In *Nielsen v. Department of Licensing* (Div. III, 2013), the Washington State Court of Appeals ruled that the statute that requires a driver to waive the driver's right to appeal a license suspension or revocation order from the DOL in order to receive an IIDL is unconstitutional.

Standards. The Washington State Patrol (WSP), by rule, requires that IIDs meet certain specifications and also provides standards for the certification, installation, repair, and removal of IIDs. All IIDs must employ fuel cell technology and when reasonably available in the area, IIDs must include technology capable of taking a photo identification of the person giving the breath sample.

Tampering With an IID. If a person is restricted to driving only vehicles equipped with an IID, it is a gross misdemeanor offense for that person to tamper with the device. It is also a gross misdemeanor offense for a person who knowingly assists another person who is restricted to the use of an IID-equipped vehicle to circumvent the device.

Implied Consent. Under the implied consent laws, a driver is presumed to have given consent to a breath alcohol concentration (BAC) test if the driver is arrested for DUI. Any

person who operates a vehicle in Washington is deemed to have given consent to a test of the person's breath for the purposes of determining the BAC, tetrahydrocannabinol (THC) concentration, or presence of any drug. Presently THC and other drugs cannot be measured or tested with a breath test.

Missouri v. McNeely. The Fourth Amendment of the United States Constitution prohibits unreasonable search and seizures. A blood draw is a search and is only constitutional if it is consensual, pursuant to a search warrant, or in exigent circumstances. In the *Missouri v. McNeely* case, the United States Supreme Court found that taking a person's blood without warrant violates a person's Fourth Amendment right and the exigency exception to the warrant requirement generally does not apply in these cases. Routine blood draws from a person suspected of DUI without consent or a warrant are unconstitutional, unless there is some special complicating factor to justify exigency.

Marijuana Open Container Statute. It is a violation of the open container law to possess a bottle or other container containing an alcoholic beverage while in a vehicle upon a highway, if the container has been opened, the seal broken, or the contents partially removed. Open containers must be kept in the trunk of the vehicle or in some other area of the vehicle not normally occupied by the driver or passengers if the vehicle does not have a trunk. A utility compartment or glove compartment is deemed to be within the area occupied by the driver and passengers. The statute does not address containers containing marijuana.

Crossing of a Lane. The Washington Court of Appeals in *State v. Tonelli-Prado* (Div. I, 2008) addressed the issue of whether a brief crossing of a traffic lane is a sufficient basis to conduct a traffic seizure under RCW 46.61.140 for a lane violation. The current law defines what is a lane travel violation is by providing that a "vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." The court found that brief incursions are to be expected when driving and therefore are not grounds for a traffic infraction as long as there is no danger to other vehicles.

Conditions of Probation. Whenever a defendant receives a jail sentence for a DUI offense, the court must also impose as a mandatory condition of probation that the person: (1) not drive a vehicle in the state of Washington without a valid driver's license and proof of liability insurance; (2) not drive or be in physical control of a motor vehicle while having an alcohol concentration of 0.08 or more or of a THC concentration of 5.00 nanograms, within two hours after driving; and (3) not refuse to submit to a breath or blood test to determine alcohol or drug concentration upon request of a law enforcement officer. A violation of probation can result in 30 days of incarceration and a 30-day suspension of a person's driver's license.

Prior Offense. Under the Impaired Driving statute, a DUI or PC offense is punishable as a gross misdemeanor. It becomes a class C felony if a person has four or more prior offenses within ten years. A prior offense is defined in statute and includes but is not limited to such crimes as operating a vehicle, aircraft, watercraft, or vessel while under the influence of alcohol or drugs.

Abstract of Driving Record. DOL maintains a driving record on every person licensed to operate a motor vehicle in Washington. These records or driver abstracts, contain information relating to a person's driving record which includes accident information, driving status, and information about traffic citations.

DOL charges a fee to obtain a driver's abstract and their release is restricted to the following persons and uses: the individual named in the abstract; employers or prospective employers relating to driving as a condition of employment; volunteer organizations where driving is required; transit authorities for volunteer vanpool drivers; insurance carriers for an individual covering the period of not more than the last three years; state colleges, universities, agencies, or units of local government for employment and risk management purposes authorized to self-insure; the Office of Superintendent of Public Instruction for school bus drivers; and in impaired driving related offenses to city attorneys and county prosecuting attorneys.

The 24/7 Sobriety Program. The pilot 24/7 Sobriety Program (Program) was established in 2014 and is administered by the Washington Association of Sheriffs and Police Chiefs (WASPC). The Program is a 24-hour and seven-day per week sobriety program in which a participant submits to the testing of the participant's blood, breath, urine, or other bodily substances in order to determine the presence of alcohol, marijuana, or any controlled substance in the participant's body. Participants who violate the terms of the Program are subject to sanctions from a written warning up to serving the participant's entire remaining sentence.

The 24/7 Sobriety Account (Account) in the state treasury, which is administered by the Criminal Justice Training Commission, defrays the costs of operating the Program. The Account can receive funds from a variety of sources, including activation and users fees. Funds from the Account are used to defray reoccurring costs of the Program. Participants' payment of fees are collected contemporaneously or in advance to fund the Program and may not be waived or reduced.

Felony DUI and PC. A DUI or PC offense is punishable as a gross misdemeanor offense if the person has fewer than four prior DUI or PC offenses within seven years. It becomes a class C felony, ranked at level V on the sentencing grid, if a person has four or more prior offenses within ten years.

A prior offense is within seven years if the arrest for a prior offense occurred within seven years before or after the arrest for the current offense. Similarly, a prior offense is within ten years if the arrest for a prior offense occurred within ten years before or after the arrest for the current offense.

Prior offenses include convictions for (1) DUI or PC; (2) vehicular homicide and vehicular assault if either was committed while under the influence; (3) negligent driving after having consumed alcohol (wet neg), and reckless endangerment, if the original charge was DUI, PC, vehicular homicide, or vehicular assault; and (4) an equivalent local DUI or PC ordinance or out-of-state DUI law. In addition, a deferred prosecution for DUI or wet neg is a prior offense even if the charges are dropped after successful completion of the deferred prosecution program.

Forensic Phlebotomy. The American Board of Forensic Toxicology defines forensic toxicology as the application of toxicology for the purposes of the law. Forensic, used as an adjective, means pertaining to the courts of justice, or to the administration of justice. Forensic phlebotomists draw blood from patients for laboratory testing. The toxicologist then identifies and quantifies the presence of drugs and chemicals in blood and tissue samples. This is done using chemical and biomedical instrumentation capable of detecting small amounts of alcohol, drugs, or toxic material, positively identifying them, and accurately measuring how much is present. This may include investigations of impaired driving; vehicular assault and homicide; drug-facilitated crimes including sexual assault; and aircraft, motor vehicle, and maritime collision investigations.

Summary of Bill (Recommended Amendments): Ignition Interlocks. *Pretrial Conditions of Release.* As a condition of release from custody at arraignment and in instances where a defendant is required to have a functioning IID installed on the defendant's vehicle as a condition of pre-trial release, the court must immediately notify DOL when the IID restriction is imposed as a condition. DOL subsequently must add a notation to the person's driving record. Once the IID restriction is lifted, the court must immediately notify DOL and DOL must immediately release any notation on the person's driving record relating to the IID restriction.

In an instance when an IID restriction imposed as a condition of release is cancelled, the court must provide the defendant with a written order confirming release of the restriction. The written order serves as proof of release of the restriction until the time DOL updates the driving record. It is a crime for a restricted driver to drive without an IID unless the notation on driver's driving record is a result from a restriction imposed as a condition of release and the restriction was released by the court prior to driving.

In an instance where it is a person's second or subsequent DUI offense, as a condition of release where the person attests to the court at arraignment that the person will not and does not plan to drive, the court must require that person to (1) have a functioning IID installed regardless on all motor vehicles operated by that person; (2) file a sworn statement with the court upon release at arraignment that states the person agrees not to operate any motor vehicle while the IID restriction is imposed by the court; and (3) submit to alcohol monitoring.

The IID requirement must still be reported to DOL and it remains unlawful for the person to operate any motor vehicle unless it is equipped with a fully functioning IID. A person violating this provision is subject to both contempt of court and operating a motor vehicle without an IID.

Liability. In a pre-trial case, as a condition of release, once a county probation or supervision department receives a written verification by an IID company stating that it has installed an IID on a vehicle owned or operated by an offender, the municipality or county has no further obligation to supervise the use of the IID by that person and is not civilly liable for any injuries or damages caused by the person for failing to use a device or for DUI.

IIDL. Any person with any valid driver's license who is convicted of a DUI offense or has their license suspended or revoked for a DUI-related offense, can apply for an IIDL. In addition any person convicted of vehicular homicide or vehicular assault, where recklessness or the disregard for the safety of others is an element of the offense, may also apply for an IIDL when the charge was originally filed as a violation committed while under the influence of alcohol or drugs.

Hearing and Appeal. The statutory provisions that prohibited an IID licensee from appealing an administrative decision imposing a license revocation is eliminated.

Standards. All IIDs must have technology capable of providing the global positioning system coordinates at the time of each test sequence. The coordinates must be displayed within the data log that is downloaded by the manufacturer and must be made available to WSP to be used for circumvention and tampering investigations.

Tampering With an IID. The elements for the crime of tampering with or circumventing an IID are expanded to include when a restricted driver (1) uses or requests another person to use a filter or other device to circumvent the IID or to start or operate the vehicle to allow the restricted driver to operate the vehicle; or (2) has, allows, directs, authorizes, or requests another person to tamper with, modify, blow, or otherwise exhale into the device in order to circumvent the device to allow the restricted driver to operate the vehicle.

Implied Consent. References to the testing of a person's breath for purposes of determining the THC concentration are removed from the implied consent statute.

Missouri v. McNeely. The references to mandatory blood draws are removed as they relate to implied consent and denial or revocation of a person's driver's license.

For purposes of a DOL hearing due to a license revocation, the hearing must consider whether the arresting officer has reasonable grounds to believe the person has been driving or was in actual physical control of a motor vehicle while intoxicated and, if a test was administered, whether the arresting officer administered the breath or blood test pursuant to a search warrant, a valid waiver of the warrant requirement when exigent circumstances exist, or under any other authority of law.

Where a person is found in actual PC, the person may petition the DOL hearing officer to apply an affirmative defense. It is an affirmative defense that must be proven by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of being in actual physical control of the vehicle and before the administration of an analysis of the person's breath or blood to cause the defendant's BAC to be over the legal limit.

Marijuana Open Container Statute. It is a traffic infraction for a person to (1) keep marijuana in a vehicle when the vehicle is upon a highway, unless it is in the trunk of the vehicle, in some other area of the vehicle not normally occupied or directly accessible by the driver or passengers if the vehicle does not have a trunk, or in a package, container, or receptacle that has not been opened or the seal broken or contents partially removed; (2) consume marijuana in a vehicle when the vehicle is upon the public highway; or (3) place marijuana in a

container specifically labeled by the manufacturer of the container as containing a non-marijuana substance. There is a rebuttable presumption that it is a traffic infraction if the original container of marijuana is incorrectly labeled and there is a subsequent violation to having marijuana in the vehicle.

Conditions of Probation. The mandatory conditions of probation for a DUI offense are expanded to include the requirement that a defendant must drive a motor vehicle with an installed functioning IID as required by DOL.

Prior Offense. The definition of a prior offense in the impaired driving statute is expanded to include a conviction for operation of a vessel in a reckless manner and operation of an aircraft in a reckless manner or while under the influence of alcohol or drugs.

Abstract of Driving Record. DOL may furnish an abstract of an individual's driving record to that individual's named attorney of record.

Physical Control. As part of a DOL hearing, an affirmative defense is established for a PC offense to an action being brought for a license revocation that the person moved the vehicle safely off the roadway prior to being pursued by a law enforcement officer.

Sentencing. Sentences for a felony DUI or PC offense must be served consecutively to any sentence for operating a motor vehicle without a required IID or circumventing and IID – both gross misdemeanors.

The 24/7 Sobriety Program. The pilot Program is defined as a program by which participants submit to testing to determine the presence of alcohol or drugs. Testing must take place at a location designated by the participating agency or with concurrence of WASPC, by an alternate method. An offender that violates the term of the Program post-trial may be sanctioned to serve the offender's remaining sentence imposed by the court. A court may remove an offender from the Program at any time for noncompliance.

WASPC must administer the Program but only when funded to do so. The Account can be used for operational and administration expenses related to the Program. Cities and counties may subsidize or pay any applicable fees related to the Program and may accept donations, gifts, and other assistance to help defray the costs of the Program.

Fourth DUI or PC Offense. A person may be charged with felony DUI or PC if the person's criminal record includes three or more, instead of four or more, prior offenses within the applicable time periods. A fourth DUI or PC offense is a class C felony ranked at level IV on the felony sentence grid. A person with three prior DUI or PC offenses and no other criminal history is subject to a standard sentencing range of 13 to 17 months' incarceration. An additional \$50 fee is assessed on all persons convicted, sentenced to a lesser charge, or given a deferred prosecution as a result of a conviction for DUI, PC, vehicular homicide, or vehicular assault. The money goes to the highway safety account to be used solely for funding Washington Traffic Safety Commission grants to organizations within counties to combat driving under the influence of alcohol or drugs.

Forensic Phlebotomists. A forensic phlebotomist is defined as a police officer, law enforcement officer, or corrections employee who has completed a venipuncture training program and who is collecting a blood sample for forensic testing. The Secretary of the Department, in consultation with other health profession boards and commissions, the WSCJTC, and WSP, must establish rules, administrative procedures, and requirements for the licensing, certification, and registration of forensic phlebotomists. This includes establishing, monitoring, and enforcing qualifications for licensure, scope or standards of practice, continuing competency mechanisms, and discipline unless this authority is otherwise authorized in statute to a health profession board or commission or to WSCJTC. The license, certification, and registration may be for a period of up to four years.

It is not professional misconduct for a physician, registered nurse, licensed practical nurse, nursing assistant, physician assistant, first responder, emergency medical technician, health care assistant, or any technician trained in withdrawing blood, to collect a blood sample without a person's consent when these professionals are directed by a law enforcement officer to do so for the purpose of a blood test under the provisions of a search warrant or exigent circumstances. The identified professionals are not subject to civil or criminal liability for withdrawing blood from any person when directed by a law enforcement officer to do so for the purpose of a blood test under the provisions of the a search warrant or exigent circumstances or a waiver of the search warrant requirement.

A refusal to draw blood by a health care professional, other than a forensic phlebotomist, does not constitute refusal to obey a law enforcement officer or obstruction of a law enforcement investigation and does not subject the person to criminal or civil liability. This does not relieve these professionals from professional discipline or liability arising from the use of improper procedures or from failing to exercise the required standard of care.

EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (Recommended Amendments): A fourth DUI or PC offense is a class C felony ranked at level IV on the felony sentence grid. An additional \$50 fee is assessed on all persons convicted, sentenced to a lesser charge, or given a deferred prosecution as a result of a conviction for DUI, PC, vehicular homicide, or vehicular assault. The money goes to the highway safety account to be used solely for funding Washington Traffic Safety Commission grants to organizations within counties to combat driving under the influence of alcohol or drugs. Breath testing for the presence of drugs is allowed.

The Program remains a pilot program. First-time DUI or PC offenders are not eligible for the Program. The Program is used for DUI or PC offenders only.

The Secretary of the Department of Health, in consultation with other health profession boards and commissions, the WSCJTC, and WSP, must establish rules, administrative procedures, and requirements for the licensing, certification, and registration of forensic phlebotomists. It is not professional misconduct for any technician trained in withdrawing blood, to collect a blood sample without a person's consent when these professionals are directed by a law enforcement officer to do so for the purpose of a blood test under the provisions of a search warrant or exigent circumstances.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Engrossed Second Substitute House Bill: PRO: Legislators hear too many stories about DUI offenders who seriously injure others. This bill is the product of an interim workgroup. The provision regarding filing an affidavit instead of having an IID installed is designed to address offenders who do not own a vehicle and do not intend to drive. The 24/7 Sobriety Program is an effort that deserves continued support. The bill clarifies that judges have discretion when formulating sanctions for 24/7 program violations. Extending the IID requirement to additional alcohol-related offenses will help more people drive legally and safely. Providing the affirmative defense for drivers who pull off the roadway prior to being pursued will encourage people to pull over and find an alternative to proceeding while under the influence. The provision enabling attorneys to obtain their clients driving records will help them provide effective representation.

Persons Testifying: PRO: Representative Klippert, prime sponsor; Jon Tunheim, Thurston County Prosecuting Attorney; Patricia Fulton, WA Assn. of Criminal Defense Lawyers, WA Defender Assn.

Persons Signed in to Testify But Not Testifying: No one.