

HOUSE BILL REPORT

ESHB 1504

As Amended by the Senate

Title: An act relating to impaired driving.

Brief Description: Concerning impaired driving.

Sponsors: House Committee on Public Safety (originally sponsored by Representatives Klippert and Goodman).

Brief History:

Committee Activity:

Public Safety: 1/29/19, 2/7/19 [DPS];

Transportation: 2/25/19, 2/28/19 [DPS(PS)].

Floor Activity:

Passed House: 3/13/19, 96-0.

Senate Amended.

Passed Senate: 4/17/19, 47-1.

Brief Summary of Engrossed Substitute Bill

- Defines the circumstances under which a vehicle is considered to be "safely off the roadway" for purposes of the defense to the crime of Actual Physical Control of a Motor Vehicle While Under the Influence.
- Grants the court discretion to waive imposition of the mandatory minimum sentence for first-time impaired driving offenses, and modifies the alternative penalties available on a second or third offense upon a showing of substantial risk to the offender's physical or mental well-being.
- Modifies provisions related to increased penalties for impaired driving cases involving minor passengers.
- Specifies that any portion of a felony impaired driving sentence that is attributed to certain impaired driving-related enhancements is not eligible for good time credits or earned release time.
- Prescribes procedures for circumstances in which a person has fulfilled a period of impaired driving-related driver's license suspension through day-for-day credit from a separate suspension arising from the same incident.

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.

- Makes various changes to the procedures governing, and processes related to, the ignition interlock restriction in impaired driving cases.
- Removes the statutory minimum qualification requirements for forensic phlebotomists, leaving minimum qualifications within the Department of Health rulemaking authority.
- Makes costs incurred through emergency response to an incident caused by an Actual Physical Control While Under the Influence offense eligible for emergency response reimbursement.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Goodman, Chair; Davis, Vice Chair; Klippert, Ranking Minority Member; Sutherland, Assistant Ranking Minority Member; Appleton, Graham, Griffey, Lovick, Orwall, Pellicciotti and Pettigrew.

Staff: Omeara Harrington (786-7136).

HOUSE COMMITTEE ON TRANSPORTATION

Majority Report: The substitute bill by Committee on Public Safety be substituted therefor and the substitute bill do pass. Signed by 23 members: Representatives Fey, Chair; Slatter, 2nd Vice Chair; Valdez, 2nd Vice Chair; Wylie, 1st Vice Chair; Barkis, Ranking Minority Member; Walsh, Assistant Ranking Minority Member; Young, Assistant Ranking Minority Member; Boehnke, Chambers, Chapman, Dent, Doglio, Entenman, Gregerson, Irwin, Kloba, Lovick, Mead, Ortiz-Self, Pellicciotti, Ramos, Riccelli and Shewmake.

Minority Report: Do not pass. Signed by 5 members: Representatives Eslick, Goehner, McCaslin, Orcutt and Shea.

Minority Report: Without recommendation. Signed by 2 members: Representatives Dufault and Van Werven.

Staff: Patricia Hasan (786-7292).

Background:

Impaired Driving Offenses.

A person may be convicted of impaired driving under either the Driving Under the Influence (DUI) statute or the Actual Physical Control of a Vehicle While Under the Influence (PC) statute. A person is guilty of DUI if he or she drives while under the influence of intoxicating liquor, marijuana, or any drug, and is guilty of PC if he or she has actual physical control of a vehicle while under the influence of intoxicating liquor, marijuana, or any drug. No person may be convicted of a PC offense—and it is an affirmative defense to an action to suspend,

revoke, or deny the privilege to drive—if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway.

A DUI or PC offense is punishable as a gross misdemeanor if the person has two or fewer prior impaired driving offenses within the previous seven years. However, a DUI or PC offense becomes a felony offense if the defendant has three or more prior impaired driving offenses within the previous 10 years, or has previously been convicted of Vehicular Homicide or Vehicular Assault while under the influence of intoxicating liquor or any drug.

A person who drives a motor vehicle while under the influence of intoxicating liquor or any drug and causes the death of another person is guilty of Vehicular Homicide–DUI, a felony. A person who causes substantial bodily harm to another person as a result of driving under the influence is guilty of Vehicular Assault–DUI, also a felony.

Penalties for Nonfelony DUI and PC Offenses.

The criminal penalties associated with a DUI or PC conviction vary according to how many prior offenses the defendant has and the defendant's blood alcohol concentration (BAC) at the time of testing. If a defendant has no prior offenses in the previous seven years, the court must impose a minimum term of either one or two days of imprisonment, depending on the person's BAC at time of arrest. In lieu of the mandatory minimum, the court may order a term of 15 or 30 days of electronic home monitoring (EHM) or a term of 90 or 120 days of 24/7 Sobriety Program monitoring.

A second or third offense within seven years carries both a mandatory minimum term of incarceration as well as a minimum term of EHM, which vary depending on the person's BAC at the time of arrest. For a second offense, the court may replace the standard sentence of 30 or 45 days of incarceration and 60 or 90 days of EHM with a minimum of either four or six days in jail and either 180 days of EHM or 120 days of 24/7 Sobriety Program monitoring. For a third offense, the court must impose a minimum term of 90 or 120 days of incarceration, but may replace the mandatory minimum of 120 or 150 days of EHM with an additional eight or 10 days of incarceration.

Regardless of whether the sentence is for a first, second, or third offense, the mandatory minimum sentence cannot be suspended, and the alternative sentence imposed, unless the court makes a written finding that the mandatory minimum sentence would impose a substantial risk to the offender's physical or mental well-being.

Impaired Driving Sentencing Enhancements and Additional Penalties for Minor Passengers.

Felony Sentencing Enhancements. Sentences for most felony offenses are determined by reference to a sentencing grid. Additional factors may affect an offender's sentence, such as statutory sentencing enhancements, which add a specified amount of time to an offender's standard-range sentence in qualifying cases. A two-year enhancement is added to the standard-range sentence for Vehicular Homicide–DUI for each prior impaired driving–related offense. A 12-month enhancement is added to the standard-range sentence for Vehicular Homicide–DUI, Vehicular Assault–DUI, felony DUI, or felony PC when there were one or more minor passengers under the age of 16 in the defendant's vehicle at the time of the

offense. These enhancements are mandatory, must be served in total confinement, and run consecutively to all other sentencing provisions.

Enhanced Penalties for Nonfelony Offenses. A sentence for a nonfelony DUI or PC offense includes enhanced penalties when there is a minor passenger under the age of 16 in the defendant's vehicle at the time of the offense. In these cases, the court must order additional imprisonment time and an additional fine, which vary depending on the number of prior impaired driving-related offenses the defendant has. Additional imprisonment ranges from 24 hours (no prior offenses) to 10 days (two prior offenses). The additional fine ranges from \$1,000 to \$5,000 (no prior offenses) to \$3,000 to \$10,000 (two prior offenses).

Additional Ignition Interlock Time. Whenever a person is convicted of DUI or PC while a minor passenger under the age of 16 is in the vehicle, the court must order the use of an ignition interlock or other device for an additional six months.

Earned Release Time.

An offender's felony sentence may be reduced by "earned release time," which is earned through good behavior and good performance, as determined by the correctional agency that has jurisdiction over the offender. The portion of the sentence that may be reduced by earned release time depends on various factors, including the underlying offense and the date of conviction. An offender may not receive any earned release time for the portion of the sentence that results from certain enhancements specified in statute.

Driver's License Suspension.

By driving a vehicle in Washington, the driver has given implied consent to a test of his or her breath for alcohol content in the event of his or her arrest for impaired driving. If the driver refuses to take the test, or if the driver's BAC is 0.08 or higher or tetrahydrocannabinol (THC) concentration is 5.00 or higher, the Department of Licensing (DOL) must revoke the person's privilege to drive for a period of at least 90 days to at least two years, depending on the circumstances. When the DOL proposes to withhold a person's driving privilege, the DOL must provide the person with at least 45 days written notice specifying the day upon which the driving privilege will be withheld.

Upon conviction of a DUI or PC offense, the DOL must suspend or deny the privilege to drive for a period of time of between 90 days and four years, depending on the person's BAC at the time of the offense and the number of prior offenses. The DOL must give credit on a day-for-day basis toward a period of suspension following conviction for any days of suspension already served on an administrative suspension, and vice versa. After the period of suspension, the person must meet certain criteria and pay a license reissue fee to reinstate the license.

Upon receiving notice of a deferred prosecution or conviction for an impaired driving offense, the DOL must order the person to surrender his or her driver's license. The license is placed in a probationary status for a period of five years. Upon reinstatement of the driving privilege after a period of suspension, the person must obtain a probationary license in order

to operate a motor vehicle. A \$50 fee is imposed for each original issue or renewal of a probationary license.

Ignition Interlock Requirements.

The DOL must require that a person only drive a vehicle equipped with a functioning ignition interlock device in certain circumstances, including:

- when required by court order as a condition of pretrial release;
- while the person has an ignition interlock driver's license;
- when a person is participating in a deferred prosecution for specified impaired driving offenses;
- after any applicable period of suspension, revocation, or denial of driving privileges due to a conviction for specified impaired driving offenses; and
- upon order of a court restricting a person who is charged or convicted with any offense involving the use, consumption, or possession of alcohol while operating a motor vehicle.

In impaired driving cases, the court must immediately notify the DOL when an ignition interlock restriction is imposed as a condition of release or after conviction and the offense involves alcohol. Upon receiving notification from the court, the DOL must make a notation on the driving record of the restricted person stating that the person may only operate a motor vehicle equipped with a functioning ignition interlock device. This notation is visible to law enforcement. If the ignition interlock restriction follows a conviction for an impaired driving offense, the period of restriction lasts one year, five years, or 10 years, depending on the number of prior offenses, and begins after any period of driver's license suspension.

The Washington State Patrol is required to provide standards in rule for the certification, installation, repair, maintenance, monitoring, inspection, and removal of ignition interlock devices. Among other requirements, ignition interlock devices must employ fuel cell technology; however, companies using noncompliant devices in 2010 were given a five-year extension to meet this requirement. An ignition interlock device must generally be calibrated to prevent the motor vehicle from being started when the breath sample provided has an alcohol concentration of 0.025 or more.

A person who is restricted to the use of a vehicle equipped with an ignition interlock device is guilty of a gross misdemeanor if he or she takes certain action to circumvent the ignition interlock device, including, but not limited to, tampering with the device by modifying, detaching, disconnecting, or otherwise disabling it to allow the restricted driver to operate the vehicle. It is also a gross misdemeanor for a restricted person to drive a vehicle that is not equipped with a functioning ignition interlock device.

Forensic Phlebotomists.

A forensic phlebotomist is a police officer, law enforcement officer, or employee of a correctional or detention facility who is certified by the Department of Health (DOH) to collect venous blood samples for forensic testing and who meets any training and proficiency standards of his or her employer. A forensic phlebotomist may only perform a venous blood draw for an impaired driving investigation under specified conditions.

The DOH must establish rules specifying minimum qualifications for forensic phlebotomists. These qualifications must include training consistent with Occupational Safety and Health Administration (OSHA) guidelines, between 20 and 30 hours of work in a clinical setting, and at least 100 successful venipunctures. The DOH may not require more than 40 hours of classroom training.

Emergency Cost Recovery.

A person whose intoxication causes an incident resulting in an appropriate emergency response by a public agency and who, in connection with the incident, has been found guilty of or received a deferred prosecution for a specified offense, is liable for the expense of the emergency response. In qualifying cases, the prosecution may present to the court information setting forth the expenses incurred by the responding public agency. If the court finds the expenses reasonable, it must order the defendant to reimburse the public agency for the cost of responding. The defendant's liability for the expense of an emergency response cannot exceed \$2,500 per incident.

The offenses eligible for emergency cost recovery are:

- DUI;
- operating an aircraft under the influence of intoxicants or drugs;
- use of a vessel while under the influence of alcohol or drugs;
- Vehicular Homicide–DUI; and
- Vehicular Assault–DUI.

Summary of Engrossed Substitute Bill:

A series of changes are made to statutory provisions related to impaired driving.

Safely Off the Roadway Defense.

The "safely off the roadway" defense to the crime of PC is defined. A vehicle is safely off the roadway if: (1) the suspected impaired person is removed from the driver's seat; (2) the vehicle is not parked in an area designated for through traffic or in any place not authorized for vehicle traffic or parking; and (3) the vehicle's engine is off.

Alternative Penalties for Nonfelony DUI and PC Offenses.

With respect to a first impaired driving offense, it is within the court's discretion to suspend the mandatory minimum sentence and impose the alternative penalties. The court need not make a finding that the mandatory minimum sentence will impose a substantial risk to the offender's physical or mental well-being. For second and third offenses, it is reiterated that the mandatory minimum sentence may be suspended, and the alternative provisions imposed, only if the court makes a finding of substantial risk to the offender's physical or mental well-being. The alternative penalties are modified to: (1) remove jail time; and (2) provide that, for a second offense, the alternative penalty is either a minimum of 180 days of EHM or 120 days of 24/7 Sobriety Program monitoring; and, for a third offense, the alternative penalty is 360 days of either EHM or 24/7 Sobriety Program monitoring.

Sentencing Enhancements and Additional Penalties for Minor Passengers.

Felony impaired driving offense sentencing enhancements for minor passengers under the age of 16 are consecutive to other minor child enhancements (in addition to being consecutive to other sentencing provisions). Minor passenger enhancements in nonfelony DUI and PC sentences apply for each minor passenger under the age of 16. Additional imprisonment time must be served consecutively for each minor passenger.

An additional 12 months, rather than an additional six months, of ignition interlock time is imposed for each minor in the vehicle at the time a DUI or PC offense is committed. In felony DUI and PC cases, and in nonfelony cases in which the penalties for having a high BAC at the time of the offense are imposed, an additional 18 months of ignition interlock time must be imposed for each minor in the vehicle.

Limits on Earned Release.

There are no good time credits or earned release time for any portion of a felony sentence that results from the following enhancements:

- the enhancement adding two years to a sentence for Vehicular Homicide–DUI for each prior impaired driving offense; and
- the enhancement adding 12 months to a sentence for Vehicular Homicide–DUI, Vehicular Assault–DUI, felony DUI, or felony PC, for each minor passenger under the age of 16.

Driver's License Suspension.

Procedures are outlined that apply when a driver's license suspension is imposed pursuant to an administrative suspension or conviction and the person has received day-for-day credit that is equal to or greater than the period of suspension due to a previously imposed period of suspension arising from the same incident. In such circumstances, the DOL must provide notice of full credit, provide for no further suspension, and not impose any additional license reissue fees. In addition, the written notice of impending license suspension provided by the DOL must include notification of the obligation to fulfill all statutory reinstatement requirements and pay the probationary license fee to avoid license suspension. If the person has fulfilled all obligations by the date specified in the written notice, the DOL must provide the probationary license with no further action on the part of the restricted person.

Ignition Interlock Conditions.

The court must immediately notify the DOL whenever an ignition interlock restriction is imposed as a condition of release or after conviction for an impaired driving offense, rather than only when the offense involves alcohol. It is specified that the ignition interlock restriction period begins after any mandatory period of license suspension.

The term of ignition interlock restriction must be extended by 180 days when the DOL receives notice that a restricted person has been convicted of driving a vehicle without an ignition interlock device or of circumventing an ignition interlock device. Law enforcement

may impound and authorize towing of any vehicle without an ignition interlock device that is being driven by a person with an ignition interlock restriction.

Ignition interlock devices must be calibrated to prevent the motor vehicle from starting when the breath sample provided has an alcohol concentration of 0.020 or more (rather than 0.025 or more). The statute temporarily grandfathering ignition interlock devices without fuel-cell technology is repealed.

Forensic Phlebotomists.

The statutory minimum qualifications for forensic phlebotomists are removed, including training consistent with the OSHA guidelines, clinical hours, and number of successful venipunctures. Statutory direction to the DOH to establish rules specifying minimum qualifications for forensic phlebotomists is retained.

Emergency Cost Recovery.

Actual PC offenses are included in the list of offenses for which the defendant may be held liable for emergency cost recovery. All payments for the cost reimbursement must be remitted directly to the public agency or agencies that incurred the cost associated with the emergency response.

EFFECT OF SENATE AMENDMENT(S):

The provision eliminating the statutory minimum qualification requirements for forensic phlebotomists is removed.

The monthly Ignition Interlock Device Revolving Account fee imposed upon persons with an ignition interlock restriction is increased from \$20 to \$21, effective January 1, 2020. The driver's license reissue fee applicable when a license has been suspended or revoked due to an impaired driving offense is increased from \$150 to \$175.

The provision defining the "safely off the roadway" affirmative defense to the crime of Physical Control is removed. Instead, the bill provides that whether a vehicle is safely off the roadway is a fact-specific determination for the trier of fact unless the vehicle is parked in an area designated for through traffic or in a place where motor vehicle traffic or parking is prohibited. It is stated that the requirement that the suspected impaired person is not in the driver's seat does not apply to an individual with approved disability parking privileges from the Department of Licensing.

The current law provisions classifying a Driving Under the Influence or Physical Control offense as a felony when the person has three or more prior offenses within ten years is modified. Three or more prior impaired driving offenses within 15 years, rather than 10 years, elevates the classification of the offense to a felony.

The Washington Association of Sheriffs and Police Chiefs must review current laws and regulations regarding the sentencing structure for impaired driving offenses, including a review of lookback periods, number of previous offenses, and other possible

recommendations to reduce fatalities. Recommendations must be provided to the Governor and the Legislature by December 1, 2019.

A section is added that removes an obsolete cross reference to an unrelated provision.

Appropriation: None.

Fiscal Note: Available.

Effective Date: This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for sections 2, 3, 6 through 11, 13, and 16, relating to earned release time on impaired driving–related sentencing enhancements, changes to penalties for non-felony impaired driving offenses, day-for-day credit for driver's license suspensions, and changes to ignition interlock provisions, which take effect January 1, 2020.

Staff Summary of Public Testimony (Public Safety):

(In support) This bill is the product of a multi-disciplinary group that has worked together in proposing legislation that will reduce the number of DUI crashes in Washington. This is an effort to make roads safer and stop harm to innocent victims.

Law enforcement officers know the effects of impaired driving. In one case, on Christmas Eve, there was a multi-car, multi-injury crash. The suspect survived in good health; first responders had to cut the vehicle open to retrieve the victim. The victim was a person with disabilities and went into emergency surgery. This case turned out to be a poly-substance DUI in which the driver was impaired with drugs and alcohol. Not long after, a vehicle with multiple passengers including a teenager crashed at a high rate of speed. The teenager was thrown through the windshield and had to have organs removed. This happens too often.

(Opposed) The portion of the bill requiring minimum training requirements for forensic phlebotomists is problematic. These requirements should not be left to the whim of an administrative process. It is not appropriate for law enforcement officers to be drawing blood at the side of the road. Blood draws can be difficult and require a trained professional. There is also a risk of unconstitutional searches.

(Other) There are problems with the "safely off the roadway" language as currently written. As it stands, a person can still be arrested and charged even if the person has moved the vehicle safely off the roadway, which leaves the burden on the driver to convince a jury of the defense by a preponderance of the evidence. The current law allows juries to make case-by-case decisions, taking into account the location of the vehicle and other evidence. Fewer than 5 percent of cases even go to trial, so there has not been a rash of acquittals on these grounds. When there is an acquittal, it means the person did the right thing. The definition as proposed now describes a situation in which the person is not even in physical control of the vehicle in the first place. It would eliminate the "safely off the roadway" defense, which currently incentivizes people to get off of the road.

The changes providing for driver license suspension credit are good. Currently, a person is given credit toward their conviction license suspension from their administrative license

suspension. A person may end up having full credit toward the conviction suspension. The DOL feels they are required to re-suspend the license momentarily in order to comply with the law. This results in the person having to go to the DOL to reinstate their license, which is confusing and leads to Driving With License Suspended violations. With this change, the DOL can give full credit for the suspension without any subsequent arbitrary technical suspension.

This bill will hold people accountable, increase safety, and deter unsafe behavior. It will ultimately save lives. These proposals are the result of a group coming together to review the DUI code and identify what changes are needed. There are 565 people who are not here today because someone chose selfishly to drive while impaired. There has been a recent increase in individuals driving while impaired with children in the car. When enhancements are imposed for having children in the car, they should be consecutive, not concurrent. These are children who have no choice but to be in the car with the driver, as they are age 15 and younger and cannot drive themselves. Also, the changes carry a deterrent value.

The physical control law is especially challenging. Officers do not have guidance on how to proceed in these cases. There are a lot of factors that officers are not equipped to deal with at the roadside. Clarifying what "safely off the roadway" means is the best practice, and the proposed language would help people do the right thing to be safe. There is value in providing a bright-line rule for officers and trial courts. Currently, cases are being lost when they should not be.

Staff Summary of Public Testimony (Transportation):

(In support) The Public Safety Committee convened a work group several times throughout the interim to work on this legislation, and the language in the legislation is approved by the majority of the participants of the work group. These are changes that Washington needs to its Driving Under the Influence (DUI) laws to make the state's streets safer. Advice was received by professionals who handle this topic on a daily basis. One particular piece of the bill is sentencing enhancements for a DUI driver that has a child under the age of 16 in the vehicle.

(Opposed) None.

Persons Testifying (Public Safety): (In support) Representative Klippert, prime sponsor.

(Opposed) Arthur West.

(Other) Miriam Norman, City of Seattle; and Jason Lantz, Washington Association of Criminal Defense Lawyers and Public Defenders Association.

Persons Testifying (Transportation): Representative Klippert, prime sponsor.

Persons Signed In To Testify But Not Testifying (Public Safety): None.

Persons Signed In To Testify But Not Testifying (Transportation): None.