

SENATE BILL REPORT

ESHB 1504

As Reported by Senate Committee On:
Law & Justice, March 28, 2019
Ways & Means, April 4, 2019

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

Committee Activity: Law & Justice: 3/25/19, 3/28/19 [DPA-WM].

Ways & Means: 4/04/19, 4/04/19 [DPA-TRAN].

Brief Summary of Amended Bill

- Defines "safely off the roadway" for the affirmative defense to actual physical control of a motor vehicle while under the influence (PC) and excludes persons with a Department of Licensing (DOL) disability parking placard from the requirement to vacate the driver's seat.
- Revises the lookback provision for prior offenses from the current 10-year lookback to a 15-year lookback for persons with three or more DUI or PC convictions.
- Allows the court to waive the mandatory minimum sentence for a first impaired driving conviction and revises the alternative penalties for the second and third offenses.
- Revises penalty enhancements for impaired driving offenses involving minor passengers.
- Precludes good time credits or earned release time for certain felony impaired driving sentences.
- Revises DOL procedures governing day-for-day credits from a separate suspension arising from the same incident.
- Modifies procedures for ignition interlock devices required for impaired driving offenses.

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.

- Adds PC to the crimes allowing recovery of emergency response costs from an incident caused by an intoxicated defendant.

SENATE COMMITTEE ON LAW & JUSTICE

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

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; Holy, Kuderer and Salomon.

Staff: Melissa Burke-Cain (786-7755)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended and be referred to Committee on Transportation.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Operating, Capital Lead; Braun, Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Bailey, Becker, Carlyle, Darneille, Hunt, Palumbo, Pedersen, Schoesler, Van De Wege, Wagoner and Warnick.

Staff: Travis Sugarman (786-7446)

Background: Impaired Driving Offenses. A person is guilty of impaired driving if their levels of intoxicating liquor, drugs, or marijuana, exceeds the levels permitted by law or affects their ability to drive, and the person is either:

- operating a vehicle under the influence (DUI); or
- PC.

A person does not commit PC if the person has moved the vehicle safely off the roadway before being pursued by a law enforcement officer.

A DUI or PC offense is a gross misdemeanor if the defendant has two or fewer prior impaired driving offenses within the previous seven years. A DUI or PC offense becomes a felony offense if the defendant has three or more prior impaired driving offenses within the previous ten years, or has a conviction for vehicular homicide or vehicular assault while under the influence of intoxicating liquor or any drug.

Penalties for Non-felony DUI and PC Offenses. The DUI or PC criminal penalties vary according to the defendant's prior offenses and 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 one or two days of imprisonment, depending on the person's BAC at time of arrest. Alternatively, the court may order 15 or 30 days of electronic home monitoring (EHM) or 90 or 120 days of 24/7 Sobriety Program monitoring.

A second or third offense within seven years carries both a mandatory minimum incarceration term and a minimum EHM term depending on the person's BAC. For a second offense, the court may replace the standard sentence of 30 or 45 days in jail 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. Whether the sentence is for a first, second, or third offense, the court cannot suspend the mandatory minimum sentence, or the alternative sentence, unless the court finds 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.

The court uses a sentencing grid when it determines the sentence for most felony offenses. Aggravating factors authorize a sentence above the standard range on the sentencing grid. A two-year enhancement above the standard-range sentence applies to vehicular homicide-DUI for each prior impaired driving-related offense. A 12-month enhancement applies to vehicular homicide-DUI, vehicular assault-DUI, and felony DUI, or felony PC when there are one or more minor passengers under the age of sixteen riding in the defendant's vehicle. These enhancements are mandatory, the offender must serve them in confinement, and the term runs consecutively to all other sentencing provisions.

An enhanced penalty applies to a non-felony DUI or PC offense when there is a passenger under the age of sixteen riding in the defendant's vehicle at the time of the offense. In these cases, the court must order added imprisonment time and an added fine, depending on the defendant's prior impaired driving-related offenses. 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. Whenever a person convicted of DUI or PC had a minor passenger under the age of sixteen in the vehicle, the court orders the use of an ignition interlock or other device for an additional six months.

Earned Release Time. Good behavior and good performance may earn an offender earned release time. The earned release time depends on various factors, including the underlying offense and the conviction date. Earned release time does not apply to certain enhancements specified in statute.

Driver's License Suspension. By driving a vehicle in Washington, drivers give implied consent to a breathalyzer test when arrested for impaired driving. If the driver refuses to take the test, or if the driver's BAC is 0.08 or higher or tetrahydrocannabinol concentration is 5.00 or higher, DOL must suspend the person's driver's license for a minimum of 90 days to two years, depending on the circumstances. DOL must give the person at least 45 days' notice of the suspension date.

A convicted driver has their driver's license suspended by DOL for between 90 days and four years, depending on the person's BAC and the number of prior offenses. DOL must give day-for-day credit for any days of suspension already served on an administrative suspension. After the suspension ends, the driver must meet certain criteria and pay a license reissue fee to reinstate their driver's license.

DOL must order the person to surrender their driver's license when it receives a notice of conviction or a deferred prosecution. Upon reinstatement after suspension, the driver must

obtain a probationary license in order to operate a motor vehicle. A \$50 fee applies to each original issue or renewal of a probationary license.

Ignition Interlock Requirements. A driver may only drive a vehicle equipped with an ignition interlock device:

- when required by court order as a condition of pretrial release;
- while the person has an ignition interlock driver's license;
- during 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
- when a court order restricts 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 immediately notifies DOL when it imposes an ignition interlock restriction as a condition of release or after conviction and the offense involves alcohol. When it receives notice from the court, DOL must note the restriction on the driver's record. Law enforcement officers have access to the driving record. If the ignition interlock restriction relates to a conviction for an impaired driving offense, the restriction lasts one year, five years, or ten years, depending on the number of prior offenses.

The Washington State Patrol promulgates rules for certifying, installing, repairing, maintaining, monitoring, inspecting, and removing ignition interlock devices. An ignition interlock device prevents the motor vehicle from starting when the driver's breath sample shows an alcohol concentration of 0.025 or more. A person who disables or circumvents the interlock device, or drives a vehicle without an ignition interlock device, commits a gross misdemeanor.

Forensic Phlebotomists. The Department of Health (DOH) certifies trained law enforcement officers and detention facility employees as forensic phlebotomists when they meet specific requirements. Forensic phlebotomists collect venous blood samples for forensic testing. A forensic phlebotomist may only collect a blood sample for an impaired driving investigation under specified conditions. DOH must establish rules specifying minimum qualifications for forensic phlebotomists. These qualifications must include training consistent with Occupational Safety and Health Administration guidelines, between 20 and 30 hours of work in a clinical setting, and at least 100 successful venipunctures. DOH may not require more than 40 hours of classroom training.

Emergency Cost Recovery. If an intoxicated person causes an incident requiring emergency response and the person is found guilty or receives a deferred prosecution for an offense arising from the incident, they are liable for the cost of the emergency response. In qualifying cases, the prosecutor may present the emergency response costs in court. If the court finds the expenses reasonable, it orders the defendant to reimburse the public agency for the costs up to a maximum of \$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 Amended Bill: Safely Off the Roadway Defense. A vehicle is safely off the roadway if:

- the suspected impaired person does not occupy the driver's seat;
- the vehicle is not parked in an area designated for through traffic or in an unauthorized parking place; and
- the vehicle's engine is off.
- a person who has a valid DOL-issued disability parking placard is not excluded from the affirmative defense solely because they remain in the driver's seat.

Lookback provision for three or more prior DUI or PC convictions. A person is charged with felony DUI or PC when they have three or more prior convictions for DUI or PC in a 15-year period.

Alternative Penalties for Nonfelony DUI and PC Offenses. For a first impaired driving offense, the court may suspend the mandatory minimum sentence and impose the alternative penalties. The court may decide the mandatory minimum sentence will impose a substantial risk to the offender's physical or mental well-being without making a specific finding. For second and third offenses, the court may suspend the mandatory minimum sentence, and impose the alternative provisions only if the court finds substantial risk to the offender's physical or mental well-being. Amendments to the alternative penalties include removing jail time; and providing for a second offense, that 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 sentence enhancements for minor passengers under the age of sixteen run consecutively with other minor child enhancements in addition to being consecutive to other sentencing provisions. Sentence enhancements because minor passengers are in the vehicle in non-felony DUI and PC sentences apply to each minor passenger under the age of sixteen. The offender must serve the additional time in custody and consecutively for each minor passenger.

The court imposes an additional 12 months, rather than an additional six months, of ignition interlock time for each minor in the vehicle when the defender commits the offense. In felony DUI and PC cases and in non-felony cases in which the court imposes penalties for having a high BAC, the offender must serve an additional 18 months of ignition interlock time for each minor in the vehicle.

Limits on Earned Release. The following enhancements preclude good time or earned release credits:

- the added two years for vehicular homicide-DUI for each prior impaired driving offense; and

- the added 12 months for vehicular homicide-DUI, vehicular assault-DUI, felony DUI, or felony PC, for each minor passenger under the age of sixteen.

Driver's License Suspension. DOL must provide notice of full credit, and impose no further suspension or additional license reissue fees, for an administrative suspension or a conviction when the driver receives day-for-day credit from a prior suspension arising from the same incident that is equal to or greater than the suspension. DOL's notice must inform a driver about reinstating their license and paying the probationary license fee to avoid a license suspension. If the restricted driver fulfills all obligations by the date specified in the written notice, DOL must provide the probationary license without requiring further action by the driver.

Ignition Interlock Conditions. The court must immediately notify DOL when it imposes an ignition interlock restriction as a condition of release or after a conviction for any impaired driving offense, not only when the offense involves alcohol. The ignition interlock restriction begins after any mandatory license suspension.

When DOL receives notice of a restricted person's conviction for driving a vehicle without an ignition interlock device, or circumventing an ignition interlock device, it extends the ignition interlock term by 180 days. Law enforcement may impound and authorize towing of any vehicle that a person with an ignition interlock restriction drives without an ignition interlock device. Ignition interlock devices must prevent the motor vehicle from starting when the breath sample alcohol concentration is 0.020 or more, rather than 0.025 or more.

Emergency Cost Recovery. The list of offenses for which the defendant may be held liable for emergency cost recovery includes PC offenses. Cost reimbursement must go directly to the public agency or agencies that incurred the emergency response cost.

EFFECT OF WAYS & MEANS COMMITTEE AMENDMENT(S):

- Restores the current law qualifications for forensic phlebotomists.

EFFECT OF LAW & JUSTICE COMMITTEE AMENDMENT(S):

- Revises the lookback provision for prior offenses from a 10-year lookback to a 15-year lookback when a person has three or more prior convictions for DUI or PC of a vehicle under the influence.
- Excludes a driver with valid DOL-issued disability privileges from the requirement to move out of the driver's seat for purposes of the affirmative defense of safely off the roadway to a PC charge.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on Engrossed Substitute House Bill (Law & Justice): *The committee recommended a different version of the bill than what was heard.*

PRO: This bill represents a consensus of stakeholders on issues addressed at a yearly meeting about improvements to our impaired driving laws. The criteria for safely off the roadway have been unclear for many years; this bill clarifies it. The bill also improves the licensing suspension procedure by directing DOL to streamline its drivers' license reinstatement process. The current DOL process is confusing to drivers and creates unintended consequences for those seeking reinstatement. A bright line standard for safely off the roadway is needed. There have been instances in which prosecutors have lost pretrial motions on the safely off the road issue as a matter of law so that the issue never gets to a jury on the facts. Understanding that the 15-year look back provision is proposed as an amendment, we agree it is a good idea and would support that amendment. If you consider the time frame needed for a quantity of alcohol to be metabolized, an hour or two sleeping it off may lead to a result that does not improve safety. The impaired driver is still not able to make appropriate decisions about their level of impairment, but after a period of sleeping in their car, believes they are now safe to drive. That is not necessarily the case when you consider the physiology of alcohol metabolism. The current safely off the roadway defense is based on a false assumption that an impaired driver has the judgment to consider and choose parking rather than driving. The science does not support that assumption.

CON: The qualifications for forensic phlebotomists should not be left to the administrative process so I oppose deleting the minimum qualifications from the current law. Blood draws can be difficult and cause harm if they are done by someone without the proper training.

OTHER: The amendment adding a bright line test to safely off the roadway is a solution looking for a problem. The safely off the roadway affirmative defense is intended as an incentive for a person who should not be driving. They should be encouraged to safely park their car rather than continuing to drive it. The current safely off the roadway affirmative defense has been on the books for approximately 40 years and is almost unique among the states. It should not be changed. The criteria for safely off the roadway proposed in the bill has significant flaws. Some individuals, for example those in eastern Washington in the winter, need to keep the engine running to stay warm or to power up their cell phone. These are safety concerns. Additionally, especially for women, turning off the ignition and getting out of the car to move to the passenger seat may be unsafe in a dark parking lot. A disabled driver may not be able to safely move out of the driver's seat because of their mobility issues and should not be penalized or disqualified from the affirmative defense.

Persons Testifying (Law & Justice): **PRO:** Representative Brad Klippert, Prime Sponsor; James McMahan, Washington Association of Sheriffs and Police Chiefs; Russell Brown, Washington Association of Prosecuting Attorneys.

CON: Arthur West, citizen.

OTHER: Miriam Norman, City of Seattle and Washington Traffic Safety Commission; Alex Uskoski, Washington Association of Criminal Defense Lawyers; William Kirk, citizen; Ryan Robertson, citizen; Howard Stein, citizen.

Persons Signed In To Testify But Not Testifying (Law & Justice): No one.

Staff Summary of Public Testimony on Bill as Amended by Law & Justice (Ways & Means): *The committee recommended a different version of the bill than what was heard.*

PRO: We are in support of the addition of Substitute Senate Bill 5299, which takes the lookback period for felony DUI to 15 years from 10. The original bill was a 25 year lookback and much more expensive. This is a good compromise. After the last hearing, I got a call from Senator Wagoner's district about an individual who had seven previous convictions and had just been picked up for his eighth, but because of the timing, he did not have four within the ten year period and thus could only be sentenced to ignition interlock. This will help. The changes to physical control are helpful. This bill is the result of an annual stakeholder meeting that is put together about improvements to impaired driving laws. The changes to the forensic phlebotomist qualifications, I believe, are made to align the requirements to general phlebotomists.

Persons Testifying (Ways & Means): PRO: Russell Brown, Washington Association of Prosecuting Attorneys; James McMahan, Washington Association of Sheriffs & Police Chiefs.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.