

HOUSE BILL REPORT

2E2SHB 1276

As Passed House:
June 11, 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:

Committee Activity:

Public Safety: 1/23/15, 1/30/15 [DPS];

General Government & Information Technology: 2/23/15 [DP2S(w/o sub PS)].

Floor Activity:

Passed House: 3/6/15, 94-4.

Senate Amended.

Passed Senate: 4/15/15, 39-9.

Second Special Session

Floor Activity:

Passed House: 6/11/15, 88-2.

Brief Summary of Second Engrossed Second Substitute Bill

- Requires the court to order specific Driving Under the Influence (DUI) offenders to install an ignition interlock device (IID) on all motor vehicles operated by the person, agree (by signing a sworn statement) not to operate any vehicle without an IID as required by the court, and participate in alcohol monitoring at the expense of the person.
- Requires the courts to notify the Department of Licensing (DOL) in instances where a defendant is required to use an IID and in instances where such restrictions are lifted.
- Eliminates the statutory provisions that prohibited an IID license applicant from appealing a license revocation.
- Requires the IIDs to have technology capable of providing global positioning system coordinates.

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.

- Removes statutory references to the testing of a person's breath for purposes of determining the presence of drugs.
- Clarifies the statutes that prohibit law enforcement officers from testing a person's blood suspected of DUI unless it is pursuant to a search warrant, a valid waiver of the warrant requirement, when exigent circumstances exist, or under any other authority of law.
- Redefines and expands the elements for the crime of Tampering with an IID.
- Makes it a traffic infraction for a person to have an open container of marijuana in the main compartment of a vehicle while on a public highway.
- Authorizes the DOL to furnish an abstract of an individual's driving record to an individual's named attorney of record.
- Requires the Department of Health to adopt rules for the training and supervision of forensic phlebotomists.
- Provides that it is not professional misconduct for a physician, nurse, etc., to collect a blood sample without a person's consent when such 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 in exigent circumstances.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Goodman, Chair; Orwall, Vice Chair; Klippert, Ranking Minority Member; Hayes, Assistant Ranking Minority Member; Appleton, Griffey, Moscoso, Pettigrew and Wilson.

Staff: Yvonne Walker (786-7841).

HOUSE COMMITTEE ON GENERAL GOVERNMENT & INFORMATION TECHNOLOGY

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Public Safety. Signed by 7 members: Representatives Hudgins, Chair; Senn, Vice Chair; MacEwen, Ranking Minority Member; Caldier, Assistant Ranking Minority Member; McCabe, Morris and Takko.

Staff: Rachelle Harris (786-7137).

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 ignition interlock device (IID)

installed on his or her 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 driving under the influence.

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, Physical Control (PC), or Vehicular Homicide while under the influence of alcohol or drugs offense, may apply for an ignition interlock driver's license (IIDL), which allows the licensee to lawfully operate a vehicle during the revocation.

Hearing and Appeal. The IIDL statute precludes a licensee who obtains an IIDL from thereafter asserting the statutory right to judicial appeal from the administrative decision imposing the revocation. The Washington State Court of Appeals ruled (in *Nielsen v. Department of Licensing*) that the statute that requires a driver to waive his or her right to appeal a license suspension or revocation order from the Department of Licensing (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.

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. As such, any person who operates a vehicle in Washington is deemed to have given consent to a test of his or her breath for the purposes of determining the BAC, tetrahydrocannabinol (THC) concentration, or presence of any drug. However, due to technology, 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; however, a blood draw is only constitutional when 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 (since metabolization of alcohol

in the body does not by itself create an exigent circumstance). As a result, 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.

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.

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. Such 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.

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 to 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 10 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.

The 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 include: accident information, driving status, and information about traffic citations.

The DOL charges a fee to obtain a driver's abstract and 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.

Physical Control.

The fact that a person charged with a PC violation is or has been entitled to use a drug does not constitute a defense against any charge of violating the law.

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 a 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 his or her 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.

Forensic Phlebotomists.

Generally, forensic toxicology is known as the application of toxicology for the purpose of solving civil and criminal cases. Toxicology is the study of substances such as drugs, toxins, and poisons that are harmful to human beings.

A phlebotomist is a person trained to draw blood from a person for clinical or medical testing, transfusions, donations, or research. A toxicologist then has the responsibility of detecting and identifying the presence of drugs and poisons in fluids, tissues, and organs. This is done using chemical and biomedical instrumentations capable of detecting small amounts of alcohol, drugs, or toxic material, positively identifying them, and accurately measuring how much is present.

Forensic drug testing is commonly used for workplace drug testing, testing of certain athletes for sports, and for law enforcement investigations such in driving under the influence cases.

Under the Health Professions Disciplinary Act, the Washington State Department of Health (DOH) regulates health professionals in 83 health professions and 7,000 health organizations and programs. The DOH investigates and prosecutes complaints against health care providers and facilities. The Secretary of the DOH and various boards and commissions discipline health care providers that violate the law. The boards work with the DOH to develop processes for receiving, investigating, and determining appropriate discipline for violations. Action can only be taken against providers that are required to be licensed, certified, or registered with the DOH.

Summary of Second Engrossed Second Substitute Bill:

Ignition Interlocks.

Pretrial Conditions of Release. Upon a person's subsequent DUI offense, as a condition of release from custody at arraignment, the court must require that person to: (1) have an IID installed on all vehicles operated by that person; (2) comply with Program monitoring; (3) have an IID installed and comply with the Program; or (4) have an IID on all motor vehicles operated by the person, agree (by signing a sworn statement) not to operate any vehicle without an IID as required by the court, and participate in Program monitoring or alcohol monitoring at the expense of the person.

The court must immediately notify the DOL when the IID restriction is imposed as a condition of release. The DOL subsequently must add a notation to the person's driving record noting the restriction. Once an IID restriction is lifted, the court must immediately notify the DOL regarding the lifting of the restriction and the DOL must immediately release any notation on the person's driving record relating to the IID restriction.

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 must serve as proof of release of the restriction until which time the DOL updates the driving record. It is a crime for a restricted driver to drive without an IID unless the notation on his or her 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.

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 device 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 driving while intoxicated.

Ignition Interlock License. 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, may 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 (known as GPS) 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 the WSP to be used for circumvention and tampering investigations.

Implied Consent.

References to the testing of a person's breath for purposes of determining the THC concentration or the presence of any drugs are removed from the Implied Consent statute.

Missouri v. McNeely.

The references to mandatory blood draws are removed in statute 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 physical control of a vehicle while under the influence, 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.

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.

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 the DOL.

Prior Offense.

The definition of a "prior offense" in the impaired driving statute is clarified.

Abstract of Driving Record.

The 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.

The 24/7 Sobriety Program.

The pilot Program is defined as a program by which a 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 the WASPC, by an alternate method. Participation in the Program is limited to persons charged with or convicted of a DUI or PC offense or a crime specifically defined as a prior impaired driving offense in which the use of alcohol or drugs was a contributing factor in the commission of the crime. An offender that violates the term of the Program post-trial may be sanctioned to serve his or her remaining sentence imposed by the court. A court may remove an offender from the Program at any time for noncompliance.

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.

Forensic Phlebotomists.

The DOH must adopt rules specifying requirements for delegation, training, and supervision for medical assistant-phlebotomists who are also law enforcement employees or correctional employees, and whose practice is limited to collecting venipuncture samples for forensic testing or pursuant to a search warrant.

At a minimum, the rules must provide: (1) standards for the minimum number of venipuncture collections necessary to maintain endorsement for collecting blood samples for forensic testing; and (2) standards for location, conditions, and supervision of venipuncture collections.

In addition, until July 1, 2020, the rules must include: (1) requiring each medical assistant-phlebotomist to perform fifty venipuncture collections during the first year of his or her certification; (2) requiring annual ongoing training for maintaining certification as a medical assistant-phlebotomist; and (3) requiring that venipuncture blood samples collected for testing take place at a site that provides for antiseptic techniques and that all such sites are inspected annually by the DOH.

It is not professional misconduct for a physician, osteopathic physician, registered nurse, licensed practical nurse, advanced registered nurse practitioner, physician assistant, osteopathic physician assistant, advanced emergency medical technician or paramedic, health care assistant, medical assistant-certified or medical assistant-phlebotomist, or hospital, or duly licensed clinical laboratory employing or utilizing services of such licensed or certified health care provider, 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 also not subject to civil or criminal liability for withdrawing blood;

however, this does not relieve these professionals from professional discipline arising from the use of improper procedures or from failing to exercise the required standard of care.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony (Public Safety):

(In support) Many DUI accidents have occurred over the holidays. This bill is a result of 40 or more stakeholders who met several times over last summer to bring this bill forward.

The first section of the bill relates to getting IIDs on the cars of repeat offenders' as soon as possible. However, the time period of when the court can impose that IID may need amending in the bill. In addition, a provision may be needed to put a safeguard in place in case the DOL puts the IID notation on the wrong person's driving record.

The bill extends the eligibility for an IID license to drivers that have been convicted of Vehicular Assault or Vehicular Homicide or disregard cases when the charge was originally filed as a DUI-related Vehicular Assault or Vehicular Homicide. The bill also extends the day-for-day credit in instances where a driver voluntarily puts the IID on his or her vehicle or has complied with a court's order by installing it as a condition of release. This encourages drivers to install the IID early on in the process when they are at the highest risk.

Several sections of the bill add an affirmative defense to encourage drivers that realize they are impaired to pull their vehicle off the roadway and to park until they are safe to drive. The bill also allows an attorney to get his or her own client's driving abstract; ensures that sentence enhancements are served without earned release credit and disqualifies persons charged with a Vehicular Homicide from handling a descendant's funeral arrangements when they were responsible for their death; and improves the IID tampering laws and the IID standards. There are a number of housekeeping changes and clarifications to be made to the bill; however, the bill is on target to fix some of the problems relating to several recent court cases over the years.

Lastly, the bill addresses how the violation of an IID condition would be required to be served consecutive to any other DUI crime and it removes language requiring a breath test for drugs since the technology for such a test is not currently available.

Washington leads the nation in traffic safety initiatives and IID technology. Out of all the deaths that occurred on the highway last year, 50 percent were due to a person being impaired.

(Neutral) Bills like this end up better when there is stakeholder input. The committee may want to review the language relating to the open container law for marijuana. As drafted, it does not appear to regulate loose marijuana. In addition, the language regarding the IID

restriction that is put in place at time of arraignment, as a condition of release, needs to be reviewed. If the current language was enacted it would require that an IID restriction appear on the DOL records. However, in some cases, as with a first-time DUI offender where a judge might order an IID restriction, there is no provision requiring the DOL to make a notation of that IID restriction in their records.

(Opposed) Drunk driving is a very serious issue. However, there should be a distinction between those that drink and drive, and those that smoke marijuana and drive. In addition, an IID is not designed to stop someone from repeat "stoned driving" and those people should not have an IID installed in their vehicles. A bottle of beer in a vehicle is different from a bag of weed in the car. There should be two reasonable differential laws: (1) an impaired driving law; and (2) a stoned driving law. The two should be treated differently. A per se law does not constitute impairment.

An affirmative defense should be added to the stoned driving laws despite the 5.00 nanogram limit, a person is not impaired.

Staff Summary of Public Testimony (General Government & Information Technology):

(In support) A work session was convened with many stakeholders over the summer to work together to make our highways safer. Ignition interlock device (IID) are a great way to keep our community safe. There were 220 DUI fatalities in 2013, out of 436 fatal crashes. There are huge lifetime economic costs for every DUI-related fatality. Nine percent of those crashes are paid for with public revenue. So there's a big economic cost to not doing this kind of legislation.

(Opposed) Second time offenders have to have IIDs installed within 5 days. The bill allows a second time offender to merely sign a sworn statement saying they won't drive. These people will drive anyway. This part was placed back in after the workgroup had decided to take it out. It's a bad idea to allow repeat offenders to get away with only a signed statement. The court could order alcohol monitoring instead of requiring a mere statement. Court oversight and monitoring is really important.

Persons Testifying (Public Safety): (In support) Representative Klippert, prime sponsor; Patricia Fulton, Washington Association of Criminal Defense Lawyers and Washington Defender Association; Amy Freedheim, King County Prosecutor's Office; Darrin Grondel, Washington Traffic Safety Commission; and Rob Huss, Washington State Patrol.

(Neutral) Glen Phillips, District and Municipal Court Judges Association.

(Opposed) Arthur West.

Persons Testifying (General Government & Information Technology): (In support) Representative Klippert, prime sponsor; and Shelly Baldwin, Washington Traffic Safety Commission.

(Opposed) Rob Reichert and Steve Luce, Smart Start Incorporated.

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

Persons Signed In To Testify But Not Testifying (General Government & Information Technology): None.