

HOUSE BILL REPORT

HB 2715

As Reported by House Committee On:
Public Safety

Title: An act relating to impaired driving.

Brief Description: Concerning impaired driving.

Sponsors: Representatives Klippert and Goodman.

Brief History:

Committee Activity:

Public Safety: 1/22/18, 1/30/18, 2/1/18 [DPS].

Brief Summary of Substitute Bill

- 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 physical or mental wellbeing.
- 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.
- Specifies that minor-passenger enhancements in impaired driving cases apply for each minor passenger and must be served consecutively.
- Requires courts to notify the Department of Licensing any time an ignition interlock requirement is imposed as a condition of release or sentence.
- Permits ignition interlock manufacturers to authorize and provide a temporary bypass mechanism allowing a person to remove an ignition interlock lockout condition for up to 24 hours in order for the vehicle to be delivered to a service location.
- 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 of Intoxicating Liquor or any Drug offense eligible for emergency response reimbursement.

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.

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; Pellicciotti, Vice Chair; Klippert, Ranking Minority Member; Appleton, Chapman, Griffey, Holy, Orwall and Pettigrew.

Staff: Omeara Harrington (786-7136).

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.

A DUI or PC offense is punishable as a gross misdemeanor if the person has two or fewer prior impaired driving offenses within seven years. However, a DUI or PC offense becomes a felony offense if the defendant has three or more prior impaired driving offenses within 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 through this conduct 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 seven years, the court must impose a minimum term of either one or two days of imprisonment, depending on BAC 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 monitoring.

A second or third offense in 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 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 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 Enhancements.

Felony Sentencing Enhancements. Sentences for most felony offenses are determined by reference to a sentencing grid. The sentencing grid provides a standard range of months for the sentence, based on both the severity, or "seriousness level," of the offense and the convicted person's "offender score," which is based on the offender's criminal history. 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 years 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 Non-Felony Sentences. A sentence for a non-felony DUI or PC offense includes enhanced penalties when there is a minor passenger under the age of 16 years in the defendant's vehicle at the time of the offense. In these cases, the court must: order the use of an ignition interlock or other device for an additional six months; order additional imprisonment time; and order an additional fine.

The length of the additional imprisonment and the amount of the additional fine vary depending on the number of prior impaired driving-related offenses the defendant has. Additional imprisonment ranges from an additional 24 hours (no prior offenses) to an additional 10 days (two prior offenses). The additional fine ranges from between \$1,000 to \$5,000 (no prior offenses) to \$3,000 to \$10,000 (two prior offenses).

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. An offender may accumulate earned release time while serving a sentence and during presentence incarceration. 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.

Ignition Interlock Conditions.

The Department of Licensing (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;
- during 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 operate only a motor vehicle equipped with a functioning ignition interlock device. This notation is visible to law enforcement.

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. According to rule, an ignition interlock will enter into a "violation reset" under specific circumstances, including: a random test failure or failure to submit to a random test, disconnection of the device, or failure to have the device serviced within a specified time period. If a violation reset occurs and the vehicle is not serviced within five days, a lockout will occur and the vehicle will be inoperable. The sale or use of any type of remote bypass code that allows a restricted driver to temporarily override a lockout condition is prohibited in rule.

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.

Forensic Phlebotomists.

When a blood test is administered for the purpose of determining its alcoholic or drug content, the blood withdrawal may only be performed by statutorily authorized professionals including physicians, nurses, physician assistants, medical assistant-certified or medical assistant phlebotomists, and advanced emergency medical technicians or paramedics, and forensic phlebotomists, among others. A forensic phlebotomist is a police officer, a law enforcement officer, or an 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 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 Substitute Bill:

Alternative Penalties for Non-Felony 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 wellbeing. 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 physical or mental wellbeing. 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 monitoring; and, for a third offense, the alternative penalty is 360 days of either EHM or 24/7 Sobriety monitoring.

Impaired Driving Sentencing Enhancements.

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 non-felony 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.

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.

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.

If an ignition interlock device lockout condition occurs, the ignition interlock device manufacturer may authorize and provide a temporary bypass mechanism that allows the restricted person or another person to remove the lockout condition for up to 24 hours in order for the vehicle equipped with the ignition interlock device to be transported for service of the device. State-approved ignition interlock devices must be capable of temporarily allowing bypass of a lockout condition upon authorization of the manufacturer.

The criminal offense of circumventing an ignition interlock device does not apply if the conduct is authorized pursuant to a lockout bypass mechanism authorized and provided by an ignition interlock manufacturer.

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.

Substitute Bill Compared to Original Bill:

The felony impaired driving sentencing enhancement for having one or more minor passengers in the vehicle runs consecutively to all sentencing provisions for all felony offenses (in addition to all other minor passenger enhancements). The current law requirement is reinstated that for a first impaired driving offense, the standard minimum penalty is 24 consecutive hours or 48 consecutive hours of imprisonment, rather than one or two days.

The alternative penalties that a court may impose for a second or third impaired driving offense upon a showing of substantial risk to physical or mental well-being are modified by: (1) removing jail time; and (2) providing that, for a second offense, the alternative penalty is either a minimum of 180 days of EHM or 120 days of 24/7 Sobriety monitoring; and, for a third offense, the alternative penalty is 360 days of either EHM or 24/7 Sobriety monitoring.

Provisions are added that: (1) permit ignition interlock manufacturers to authorize and provide a temporary bypass mechanism allowing a person to remove an ignition interlock lockout condition for up to 24 hours in order for the vehicle to be delivered to a service

location; (2) require state-approved ignition interlock devices to be capable of temporarily allowing bypass of a lockout condition upon authorization of the manufacturer; and (3) create an exception to the crime of circumventing an ignition interlock device for instances in which the ignition interlock manufacturer has authorized a temporary bypass of the lockout condition.

The effective date for the section of the bill pertaining to penalties for non-felony impaired driving offenses is delayed to April 1, 2019.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 5, 2018.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 6, relating to penalties for non-felony impaired driving offenses, which takes effect April 1, 2019.

Staff Summary of Public Testimony:

(In support) This bill represents a collaborative effort to address a real issue in Washington. There are heroes who make the roads safer and also family members who know what the effect can be when a person chooses to become intoxicated and drive. For law enforcement, it only takes one crash to know that something needs to be done to make the roads safer. There is a terrible problem with impaired driving in this state that has only worsened with the legalization of a second impairing substance and the opioid epidemic. Fatalities are becoming more frequent. All people deserve to be safe on the road.

When a person chooses to get into a car impaired, that person is responsible for the destruction he or she causes. Years ago, the Legislature created a two-year felony enhancement applicable to repeat impaired driving offenders who kill someone. Despite the fact that the statute says these enhancements are mandatory and to be served in total confinement, offenders have been granted good time, curtailing what should be a two-year enhancement to 18 months. The same issue exists with the minor child enhancement, which ends up being eight months, rather than 12 months. The intent was to have minor child enhancements served consecutively for each child in the car, otherwise it would not matter how many children are in the car. In recent case law, clarifying language is needed to ensure this will be how the statute is implemented. There is a responsibility to the families affected by these incidents that the sentencing law has some teeth. Emergency reimbursement should apply in PC cases.

Families have been seriously affected by drunk driving incidents. In one family, a son was struck by a drunk driver and suffered a traumatic brain injury and numerous other injuries. In the legal system, sympathy is pointed at the wrong person—the accused. In this case, the defendant only did two weeks of time and was let out for good behavior, which is a shorter time than the victim was in a coma. Statistics indicate that when a person has been arrested for impaired driving, that person has driven drunk an average of 80 times. Penalties should

be stiffer for people who drive impaired. People do not commit this crime by accident and they do not need to be babied.

Lakewood was the first jurisdiction in the state to have a forensic phlebotomy program. The program was created in light of issues around locating hospital phlebotomists to perform blood draws on impaired driving suspects and a desire to decrease the time for recovering evidence. These programs could be operated under existing statutes and rules, and the additional provisions put into statute were not needed. Now, minimum credentials are not possible to meet. For example, current statute requires 100 sticks within a clinical setting. The medial assistant phlebotomist credential does not even require this. It should be left to the DOH to outline the requirements.

(Opposed) There is no evidence that increasing punishment will decrease recidivism, it will only increase corrections costs. Education and treatment have been shown to increase public safety, and Washington should invest in preventing impaired driving from happening in the first place. The change to the penalties section takes away discretion from the judges to impose EHM when there is documented proof that incarceration will cause substantial harm. It is very difficult to get a sentence converted to EHM, as it must be argued that it would be a serious medical risk to send the defendant to jail. In one instance, there was a request for accommodation which was denied and a person died as a result of substandard care. Jails are not trauma facilities and are limited. Taking away judicial discretion to impose EHM when there is substantial risk of harm exposes the counties and the state to liability.

Persons Testifying: (In support) Representative Klippert, prime sponsor; Amy Freedheim, King County Prosecutor's Office; Jacob Davis; Albania Davis; Kymm Cox, City of Lakewood; and Tammy Ross, Multicare.

(Opposed) Sheri Pewitt, Washington Defender Association and Washington Association of Criminal Defense Lawyers; and Elisabeth Smith, American Civil Liberties of Union of Washington.

Persons Signed In To Testify But Not Testifying: None.