

HOUSE BILL REPORT

ESHB 1504

As Reported by House Committee On:
Public Safety

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], 1/13/20, 1/23/20 [DP2S].

Brief Summary of Second Substitute Bill

- Grants the court discretion to waive imposition of the mandatory minimum sentence and impose alternative penalties 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.
- Makes various changes to the procedures governing, and processes related to, the ignition interlock restriction in impaired driving cases.
- 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.
- Increases the driver's license reissue fee following an impaired driving-related suspension or revocation from \$150 to \$175.

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.

- Increases the monthly Ignition Interlock Device Revolving Account fee imposed on persons with an ignition interlock restriction from \$20 to \$21.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass. Signed by 10 members: Representatives Goodman, Chair; Davis, Vice Chair; Appleton, 2nd Vice Chair; Klippert, Ranking Minority Member; Sutherland, Assistant Ranking Minority Member; Graham, Lovick, Orwall, Pellicciotti 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 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 felony impaired driving, or 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. The fee for reissuance of a driver's license following the probationary period is \$150.

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.

The installation of an ignition interlock device is not necessary on vehicles owned, leased, or rented by a person's employer and driven at the direction of a person's employer as a

requirement of employment during working hours. The person must provide the DOL with a declaration from his or her employer stating that the person's employment requires the person to operate a vehicle owned by the employer or other persons during working hours. The employer exemption does not apply when the employer's vehicle is assigned exclusively to the restricted driver and used solely for commuting to and from employment.

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.

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 DOL will not remove a restriction associated with a deferred prosecution or conviction until it receives a declaration from the ignition interlock vendor certifying that the 180 days leading up to the removal have been free of certain specified incidents including:

- any attempt to start the vehicle with a BAC of 0.04 or more;
- failure to take any random test;
- failure to pass any random retest with a BAC of 0.025 or lower; or
- failure of the person to appear at the ignition interlock device vendor when required for maintenance, repair, calibration, monitoring, inspection, or replacement of the device.

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.

An ignition interlock user must pay the cost of installing, removing, and leasing the ignition interlock device, unless the ignition interlock company waives costs or the person is indigent. In addition, the user must pay a monthly \$20 fee for deposit into the Ignition Interlock Device Revolving Account.

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 Second Substitute Bill:

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

Penalties for Nonfelony DUI and PC Offenses.

With respect to a first impaired driving offense, it is within the court's discretion to suspend or convert 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 or converted, 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.

References are changed from "alcoholism" and "alcohol or drug dependency" to "substance use disorder" in the provisions relating to criminal penalties and drivers licensing consequences for impaired driving offenses.

Sentencing Enhancements and Additional Penalties for Minor Passengers.

Felony impaired driving offense sentencing enhancements for minor passengers under the age of 16 years 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 years. 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 must be 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 years.

Driver's License Suspension and Reissuance.

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.

The fee for reissuance of a driver's license following an impaired driving-related suspension or revocation is increased from \$150 to \$175.

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. When the DOL receives a declaration stating that the employer exemption to the ignition interlock restriction applies, the DOL must note the exemption on the restricted person's driving record.

Ignition interlock devices must have an alcohol set point preventing 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), and provisions regarding the alcohol set point for a random retest of the driver's BAC are harmonized to uniformly refer to a failure to pass a random retest with "lower than" 0.020 BAC. The statute temporarily grandfathering ignition interlock devices without fuel-cell technology is repealed.

The crime of circumventing an ignition interlock device is modified to include tampering with any components of the device or otherwise interfering with its functionality. 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.

An ignition interlock device must be inspected by a Washington State Patrol-certified technician at the end of the 180-day compliance period for evidence of tampering, and removal of the device by anyone other than a certified technician resets the compliance period. The DOL may waive one or more requirements for removal of an ignition interlock device for persons living out of state when compliance with the Washington requirement would be impractical and the person is in compliance with any equivalent requirement of their home jurisdiction.

The monthly Ignition Interlock Device Revolving Account fee imposed on persons with an ignition interlock restriction is increased from \$20 to \$21.

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.

Second Substitute Bill Compared to Engrossed Substitute Bill:

The provisions of the bill are removed that: (1) define "safely off the roadway" for purposes of the defense to the crime of PC; and (2) remove the statutory minimum qualifications for forensic phlebotomists.

References are changed from "alcoholism" and "alcohol or drug dependency" to "substance use disorder" in the provisions relating to criminal penalties and driver's licensing consequences for impaired driving offenses.

The crime of circumventing an ignition interlock device is modified to include tampering with any components of the device, or otherwise interfering with the proper functionality of the device. If an underlying ignition interlock restriction is fulfilled and therefore cannot be extended for 180 days as a consequence of conviction for driving without an ignition interlock device or circumventing an ignition interlock device, the DOL must impose an additional 180-day period of restriction (rather than a 180-day extension), subject to the same removal requirements as the underlying restriction. References to the "calibration" of ignition interlock devices is changed to instead say "alcohol set point" when referencing the point at which the vehicle will not start due to the driver's breath sample exceeding a certain alcohol limit.

Changes are made to the requirements for the 180-day compliance period leading up to removal of the ignition interlock restriction: (1) provisions regarding the alcohol set point for a random retest of the driver's BAC are reconciled so that all references are to passage of a random retest with "lower than" 0.020 BAC (rather than 0.020 or lower); (2) an inspection of the device must be performed by a Washington State Patrol-certified ignition interlock technician at the end of the compliance period for evidence of tampering, and removal of the

ignition interlock by a person other than a certified technician is an incident that resets the compliance period; and (3) the DOL may waive one or more of the compliance period requirements when the restricted person lives in another state and compliance with the Washington requirement would be impractical, as long as the person is in compliance with any equivalent requirement of his or her home jurisdiction. Additionally, when the DOL receives a declaration stating that the employer exemption to the ignition interlock restriction applies, the DOL must note the exemption on the restricted person's driving record.

The driver's license reissue fee following an impaired driving-related suspension or revocation is increased from \$150 to \$175. The monthly Ignition Interlock Device Revolving Account fee imposed on persons with an ignition interlock restriction is increased from \$20 to \$21.

The effective date is delayed to May 1, 2021, on numerous provisions of the bill, including those related to earned release time on impaired driving-related sentencing enhancements, changes to penalties for nonfelony impaired driving offenses, day-for-day credit for driver's license suspensions, and changes to ignition interlock device provisions. Other minor changes are made for clarification and internal consistency, as well as technical corrections to update underlying sections of law that were amended by other legislation in 2019.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for sections 2, 3, 5 through 12, and 14 through 17, relating to earned release time on impaired driving-related sentencing enhancements, changes to penalties for nonfelony impaired driving offenses, day-for-day credit for driver's license suspensions, and changes to ignition interlock provisions, which take effect May 1, 2021.

Staff Summary of Public Testimony:

(In support) This bill is about public safety. Law enforcement knows firsthand the effects of impaired driving crashes and innocent people suffering. These tragedies need to end.

Removing the second license suspension and fine is important. Imposing a second suspension and fine does not further public safety and people are not aware that they are suspended, so they drive in good faith thinking they are in compliance. The enhancements related to children in the car are particularly important, as the inherent selfishness of impaired driving affects children. Currently, in nonfelony cases, multiple children in the car count as one. A child has no say as to whether they get in the car or not. Prosecutors have seen impaired driving cases involving unsecured infants, accidents involving children, and many children in the car. A harder stance needs to be taken. Also, the clarification around substantial harm for sentencing purposes is needed. Persons who would be truly harmed by jail time should not go into custody; however, defendants who will not be substantially

harmful are currently avoiding jail. Allowing judges additional discretion and allowing leniency in sentencing for second and third offenses is good. A lot of people do not realize they have a substance use disorder or a mental health issue until their second DUI, and this gives judges another tool.

Impaired driving is exceptionally dangerous behavior. These issues are now more complex than ever with drug use, and increases in poly-drug cases lead to more blood tests. The toxicology lab is underfunded. In large part this is because of drug use, the opiate crisis, and the legalization of recreational marijuana. As these substances can only be detected by blood, there has been a huge increase in blood draws. The blood test result backlog is 10 months in felony cases, and testing does not begin for 10 or 11 months in nonfelony cases. This delays justice, and allows involved persons to continue to drive. Also, in some cases, a person has a pending charge only to have the blood evidence exonerate them much later.

Forensic phlebotomists have a different training threshold than medical assistant phlebotomists. This bill would allow the Department of Health to set the requirements for both credentials. The number of venipunctures in statute for forensic phlebotomists is very high, and they also have to be completed in a clinical setting. These statutory requirements are prohibitive. Certification should be based on competency. Requiring a person to be taken to a hospital, as currently happens, takes an officer off the street for a long time, and results in blood draws not happening when they should be. Forensic blood draws are not completed on the roadway, but in a facility at the police station.

(Opposed) The bill has some good components, including giving judges discretion in sentencing for the first offense. It is also good that the proposed substitute bill removes the definition of "safely off the roadway," as no statutory definition is necessary. The problem with the bill is the lessening of training requirements for forensic phlebotomists. Training requirements should not be left to agency rulemaking, which is not always a transparent process and has led to issues in the recent past. This change is not in the people's best interest. There should be no ignition interlock requirement for solely marijuana-based offenses. Blood testing should be quick and efficient because justice delayed is not justice, and a determination needs to be made quickly so that people who did drive impaired are not back on the road.

Persons Testifying: (In support) Representative Klippert, prime sponsor; Jon Benefiel, Washington Association of Criminal Defense Lawyers and Washington Defender Association; Miriam Norman, City of Seattle; Amy Freedheim, King County Prosecutor's Office; and Shelly Helder, City of Lakewood.

(Opposed) Arthur West.

Persons Signed In To Testify But Not Testifying: None.