

2003 CHANGES TO MICHIGAN'S DRUNK DRIVING LAWS

.08

AND
OTHER
CHANGES

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FAST FACTS:

Two new drunk driving statutes took effect September 30, 2003 with a sunset provision, by which they expire on October 1, 2013.

There is no longer a blood-alcohol threshold used to prove Operating While Visibly Impaired.

A separate measure creates a driver responsibility fee that is assessed by Michigan's Secretary of State for any drunk driving conviction or whenever a driver reaches seven points or more on his or her driving record.

In July of 2003, the Michigan legislature passed, and the governor signed into law, two bills designed to bring Michigan into compliance with the National Highway Transportation Safety Administration's requirement that all states adopt a blood-alcohol threshold of .08 percent for drunk driving offenses.¹ Although the amendments make this change, they include a number of other significant changes to the existing law. The following are some of the more significant changes.

Operating While Intoxicated (OWI)

The legislation changes the name of the offense from Operating Under the Influence of Liquor to Operating While Intoxicated.² That offense includes both operating with a blood-alcohol level of .08 percent or more,³ as well as operating while under the influence of alcohol, a controlled substance, or a combination of alcohol and a controlled substance.⁴

Operating While Impaired (OWVI)

The legislation retains the offense of Operating While Visibly Impaired.⁵ However, there is no longer a blood-alcohol threshold used to prove OWVI.

Presumptions Gone

Under the prior statute, a person was presumed to be Operating Under the Influence if he or she had a Blood Alcohol Count (BAC) of .10 percent or greater; OWVI if he or she had a BAC of greater than .07 percent but less than .10 percent; and not impaired if he or she had a BAC of .07 percent or less.⁶ Those presumptions are gone from the new legislation. While it is unlawful to drive with a BAC of .08 percent or more, there is no longer a presumption that a person is *not impaired* with a BAC of .07 percent or less. Thus, it is possible for a prosecutor to charge impaired driving even if a person has a BAC level of .07 percent or less.

New Offense of Driving with Any Amount of a Controlled Substance

Bound to be one of the most controversial aspects of the new legislation, the statute now includes the offense of Operating with Any Amount of a Schedule 1 Controlled Substance (opiates, opium derivatives, hallucinogens, marijuana, GHB, and ecstasy) or cocaine in the blood stream.⁷ This part of the new statute has nothing to do with keeping impaired drivers off the road, since at least the metabolites for most of these drugs can be found in the blood stream days or even weeks after they were taken, while the impairment is usually

gone in a few hours. In fact, with a hair test, it is possible to find the metabolites for these substances in a person's body up to 90 days after the fact. Since the new statute prohibits a person from operating a vehicle if "the person has in his or her *body* any amount" of a controlled substance, this is presumably not limited to breath, blood, or urine.

The new offense is treated the same as Operating While Intoxicated in terms of jail time, fines, costs, community service, and licensing sanctions.⁸

Ignition Interlock Devices

The new statute allows the court to require the installation of an ignition interlock device as a condition of probation for both driving while intoxicated and driving with any amount of a controlled substance.⁹ Thus, while an offender may have only a six-month license suspension from the Secretary of State, the court can require the ignition interlock device installed throughout the term of probation (up to two years).

Court Cannot Allow Plea to Zero Tolerance if Originally Charged with Greater Offense

The new legislation slightly changes the rules regarding pleas to zero-tolerance offenses. Where the old statute allowed the court to accept a reduced plea from another alcohol offense to a zero tolerance offense with agreement of the prosecutor, the new law only allows the court to dismiss the original charge on motion of the prosecuting attorney.¹⁰ Thus, reduced pleas to zero-tolerance offenses, while still possible, will be more cumbersome.

Presumption Regarding BAC at Time of Driving

The new statute slightly changes the presumption regarding a person's blood-alcohol level at the time of the offense. The old law allowed, but did not require, the fact finder to presume that a person's BAC at the time of testing was the same as it was at the time of driving. The new law makes that presumption mandatory.¹¹ While the presumption—like any other legal presumption—may be overcome, it now appears to be the defendant's burden to disprove the assumption by affirmative evidence.

Implied Consent Suspension Lengthened

The new law lengthens the time of implied consent suspensions to one year for a first implied consent refusal and five years for all subsequent implied consent refusals within a seven-year period.¹²

Changes to Sentencing Guidelines OV-3 and OV-18

HB 4248 changes the sentence guidelines scoring to reflect the new lower .08 percent BAC threshold. Thus, OV-3 includes 50 points for death resulting from a drunk driving offense where the offender had a BAC of .08 percent or more.¹³ Similarly, OV 18 does away with the 5 points for a BAC of .07 percent or more but less than .10 percent, and folds all offenses with a BAC of .08 percent or more but less than .15 percent into the 10 point category.¹⁴

Effective Date and Sunset Provision

Both statutes took effect September 30, 2003. For some reason, they include a sunset provision, making the new .08 percent BAC threshold expire on October 1, 2013, at which time the BAC threshold reverts back to .10 percent.¹⁵ Most practitioners believe the law will be made permanent.

Michigan's New "Bad Driver Tax"

During the same session where Michigan's legislators amended Michigan's drunk driving laws to bring them into compliance with the national .08 "legal limit," the legislature also drafted, and the governor signed into law, a new revenue-producing measure.¹⁶ This new measure creates a "driver responsibility fee" that is assessed by Michigan's Secretary of State whenever a driver reaches seven points or more on his or her driving record. Additionally, certain enumerated offenses require the payment of very high fees, and these higher fees are independent of the number of points otherwise assessed. Since the Secretary of State imposes the driver responsibility fees, those fees are in addition to the fines and court costs, probation oversight fees, alcohol screening fees, community services fees, reimbursement to the police agency, and other fees. It is not hard to see that a single drunk driving conviction will now cost the offender several thousand dollars.

This new law provides that the Secretary of State "shall send notice of the driver responsibility assessment" to the individual informing him or her of the fee. The fee must then be paid within 30 days of the notice, or a second notice will be sent. If the fee is not paid within 30 days of the second notice, then the driver's driving privileges will be suspended by the Secretary of State until the fee is paid. Since the suspension is "indefinite," a person cannot obtain his or her license until the assessment is paid.

It is also worth noting that this measure indicates that the fee is due whether or not the individual is a licensed driver. The result is that even where the individual has lost his or her driving privileges for one or more years, the fees remain due during this non-license period, and must still be paid.

The following is a list of driver responsibility fees, which are assessed each year for two consecutive years after the offense:

The \$1,000 Offenses¹⁷

- Operating while intoxicated
- Manslaughter
- Negligent homicide
- Drunk driving causing death or serious impairment of a body function
- Injuring or killing a construction worker while driving in a construction zone

- Felonious driving or any other felony resulting from the operation of a motor vehicle
- Fleeing and eluding an office
- Failing to stop and disclose identity at an accident

The \$500 Offenses¹⁸

- Impaired driving
- Operating with the presence of any enumerated controlled substance
- Reckless driving
- Driving with a suspended license (non-felony)
- Being a person less than 21 years operating with the presence any alcohol (zero tolerance).

Driving Without a License and/or Failing to Produce a Certificate of Insurance¹⁹

Upon learning that an individual has been found guilty of driving without a license or failure to produce a certificate of insurance, the Secretary of State will assess a \$150 driver responsibility fee for each of the following two consecutive years.

Accumulating Seven or More Points²⁰

Any driver who accumulates seven or more points within a two-year period for any other violation shall be assessed a \$100 driver assessment fee, with an additional \$50 for each additional point. The driver will be assessed this fee once per year for each year until the point total falls below seven. ◆

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Footnotes

1. HB 4227, which became Public Act 61 of 2003, and HB 4248, which became Public Act 134 of 2003.
2. MCL 257.625(1).
3. MCL 257.625(1)(b).
4. MCL 257.625(1)(a).
5. MCL 257.625(3).
6. MCL 257.625a(9).
7. MCL 257.625(8).
8. MCL 257.625(9).
9. MCL 257.625(24).
10. MCL 257.625(16).
11. MCL 257.625a(6)(a).
12. MCL 257.625f(1)(a).
13. MCL 777.33(1)(c).
14. MCL 777.48(1)(c).
15. MCL 257.625(1)(b).
16. MCL 257.732a.
17. MCL 257.732a(2)(a).
18. MCL 257.732a(2)(b).
19. MCL 257.732a(2)(c).
20. MCL 257.732a(1).