

Alcohol Countermeasures

Illegal Per Se and Preliminary Breath Testing

ISSUE PAPER

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ALCOHOL COUNTERMEASURES
ILLEGAL PER SE
AND
PRELIMINARY BREATH TESTING LAWS

Issue

Efforts are expected in several State legislatures to enact Illegal Per Se (enacted in 13 States) and Preliminary Breath Testing (enacted in 13 States and Puerto Rico) Laws. Both statutes are considered to be central to increasing drunk driving arrests and convictions at the State and local level.

Discussion

Illegal Per Se: Briefly, the Illegal Per Se Law established as a traffic offense the operation of a motor vehicle with a blood alcohol concentration (BAC) equal to or in excess of a specified level -- typically 0.10 percent w/v. This statute represents a significant improvement over the traditional Driving While Intoxicated or DWI laws in several respects. First, it raises the legal significance given to a BAC of 0.10 percent or more from presumptive evidence of intoxication to conclusive evidence of intoxication. Second, some of the more subjective (and, hence more refutable) aspects of establishing the offense of DWI (e.g., behavioral tests, slurred speech, etc.) are eliminated as evidentiary indicators of guilt or innocence. Hence, the Illegal Per Se BAC level is the sole criterion for determining legal intoxication.

The adoption of Illegal Per Se Laws has been made possible in recent years by two factors: 1) The increased scientific/research support for the BAC as an objective measure of impairment of the ability to drive, and 2) the rapid improvement in breath alcohol measurement technology and chemical testing programs.

Recognizing the BAC as a valid measure of impairment not only benefits and improves prosecution of drunk drivers through per se laws, but guarantees the defendant an objective criterion for establishing his guilt or innocence. The development of accurate breath alcohol measurement devices has enabled enforcement agencies to gather this critical BAC evidence in a rapid and efficient manner within the police station and at the roadside.

It should be noted parenthetically that the per se law is not intended to completely supplant existing DWI laws. Police agencies and the courts can and do apprehend and convict drivers with BACs less than 0.10 percent. Though not over 0.10 percent, many drivers in the 0.05 - 0.10 percent BAC range are significantly impaired and can be charged under traditional DWI laws in situations wherein a chemical BAC test is not given. Thus, the per se law is both an improvement and complement to the traditional DWI statutes.

Preliminary Breath Testing: Just as the Illegal Per Se Law facilitates the prosecution of drunk drivers, a complementary law, the Preliminary Breath Testing (PBT) statute, enhances the ability of the police to detect the drunk driver. Briefly, the PBT statute extends to police the legal right to request of suspected drunk drivers a preliminary breath test at the roadside to determine their level of intoxication. Though non-evidential (in most States), the preliminary breath test provides a PASS/WARN/FAIL or a digital reading to indicate whether the driver is above or below the 0.10 percent legal limit. This information is used by the police officer to help decide whether he had probable cause to charge the driver with DWI or Illegal Per Se violation.

Only with recent developments in breath alcohol measurement technology has efficient and reliable roadside testing been possible. With the availability of the highly portable electronic preliminary breath tester, police have been able to extend the use of the BAC measurement as an objective criterion upon which to base their arrest decisions in the field. No longer is it necessary to rely solely on subjective assessments of impairment based on behavioral indications such as slurred speech, dilated pupils, and psychomotor tests which do not accurately reflect each individual's level of intoxication. Further, the driver who has only had a limited amount to drink or suffers from certain medical conditions can now objectively assert his innocence to the police with a preliminary breath test.

Experience at the State and local level with preliminary breath testing programs has confirmed the utility of this procedure as an effective law enforcement tool. PBT use has several potential benefits to DWI/Per Se Law Enforcement:

- Increased arrests
- Arrests at lower BACs (0.10 - 0.15 percent).
- Improved quality of arrests (due to an objective indication of intoxication)
- Roadside exoneration from DWI charges for drivers with non-alcohol impairment with resultant savings in police manpower time.

Position

States should be encouraged to adopt the Preliminary Breath Test and Illegal Per Se Laws since they increase the number of drinking driver arrests and the conviction rate for such arrests.

Copies of model laws accompany this paper.

ACCOMPANYING MATERIAL

MODEL LAW
UNIFORM VEHICLE CODE

UVC Section 11-902(a) - A person shall not drive or be in actual physical control of any vehicle while:

1. There is 0.10 percent or more by weight of alcohol in his blood;
2. Under the influence of alcohol;
3. Under the influence of any drug to a degree which renders him incapable of safely driving; or
4. Under the combined influence of alcohol and any drug to a degree which renders him incapable of safely driving.

MODEL LAW

PRELIMINARY BREATH TEST - IMPLIED CONSENT LAW

(Would amend UVC § 6-205.1)

a. When a police officer has reason to believe that a person is driving or in actual physical control of any vehicle in this State while under the influence of alcohol, the police officer may require such person to submit to a preliminary breath analysis for the purpose of determining such person's blood alcohol content. Such breath analysis must be administered at the scene of the stop upon the police officer's formulation of the reasonable belief that the person is driving or in actual control of a vehicle while under the influence of alcohol. Any chemical breath analysis required under this section must be administered with an instrument and in a manner approved by the Commissioner for that purpose. The results of a preliminary chemical breath analysis may be used for the purpose of guiding the officer in deciding whether an arrest should be made. When a driver is arrested following a preliminary breath analysis, another test may be taken pursuant to paragraph (c).

b. Any person who violates this section by refusing, upon a lawful request of a police officer to submit to a test under subsection (a) of this section, shall be subject to a fine of not more than \$50. However, it shall be a defense to a charge of refusing a validly requested preliminary breath analysis that the medical condition of a person precluded the giving of any such test.

c. Any person who operates a motor vehicle upon the public highways of this State shall be deemed to have given consent, subject to the provisions of § 11-902.1 to a test or tests of his blood, breath, or urine for the purpose of determining the alcohol or drug content of his blood if a law enforcement officer, who may direct such tests or test be administered, has reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the highways of this State while under the influence of alcohol or any drug and one of the following conditions exist: 1) the said person has been lawfully placed under arrest for alleged violation of § 11.902, or 2) as provided by paragraph (a) of this section, a preliminary breath test was administered and the person recorded a blood alcohol concentration of 0.10 percent or more.

d. Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by paragraph (a) of this section and the test or tests may be administered, subject to the provisions of § 11-902.1 (Revised, 1971).

e. A person requested to subject to a chemical test as provided above shall be warned by the law enforcement officer requesting the

test that a refusal to submit to the test will result in revocation of his license to operate a motor vehicle for six months. Following this warning, if a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test or tests designated by the law enforcement agency as provided in paragraph (c) of this section, none shall be given, but the department, upon the receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle upon the highways of this State while under the influence of alcohol or any drug and that the person had refused to submit to the test or tests upon the request of the law enforcement officer, shall revoke his license subject to review as hereinafter provided.

