

## HOUSE BILL NO. 393

INTRODUCED BY MENDENHALL, WANZENRIED

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THAT FEDERALLY MANDATED DRUG AND ALCOHOL TESTS OF COMMERCIAL MOTOR VEHICLE OPERATORS BE REPORTED TO THE DEPARTMENT OF JUSTICE IF THE TEST RESULTS ARE POSITIVE; REQUIRING THAT A REFUSAL TO SUBMIT TO DRUG OR ALCOHOL TESTING BE REPORTED AND TREATED AS A POSITIVE TEST RESULT; REQUIRING THE DEPARTMENT OF JUSTICE TO SUSPEND A COMMERCIAL DRIVER'S LICENSE UPON RECEIPT OF A REPORT OF A POSITIVE DRUG OR ALCOHOL TEST; PROVIDING FOR A HEARING UPON SUSPENSION OF A COMMERCIAL DRIVER'S LICENSE AND PROVIDING REQUIREMENTS FOR THE HEARING; ALLOWING A PERSON WHOSE LICENSE HAS BEEN SUSPENDED TO PETITION THE DISTRICT COURT FOR REVIEW OF THE SUSPENSION; PROVIDING THAT, UNDER CERTAIN CIRCUMSTANCES, A SUSPENSION IS NOT IN EFFECT WHILE A HEARING OR REVIEW BY A DISTRICT COURT IS PENDING; ALLOWING THE DEPARTMENT OF JUSTICE TO ADOPT RULES REGARDING THE HEARING PROCESS AND OTHER PROVISIONS OF THE SUSPENSION PROCESS; REQUIRING A LICENSE SUSPENSION TO REMAIN IN EFFECT UNTIL A PERSON HAS UNDERGONE DRUG AND ALCOHOL ASSESSMENT AND TREATMENT; ~~LIMITING GOVERNMENTAL LIABILITY~~; AND REQUIRING THAT A COMMERCIAL DRIVER'S LICENSE BE PERMANENTLY SUSPENDED UNDER CERTAIN CIRCUMSTANCES."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Commercial motor vehicle operator drug and alcohol testing -- reporting of results required -- definitions.** (1) As used in [sections 1 and 2], the following definitions apply:

(a) "Breath alcohol technician" means a person who is qualified to perform services related to the federal department of transportation's alcohol testing program under 49 CFR 40.213.

(b) "Commercial motor vehicle operator employer" means a person or entity who employs operators of commercial motor vehicles and who is required to have a drug and alcohol testing program under 49 CFR, part 382, that is conducted under the procedures established in 49 CFR, part 40.

(c) "Medical review officer" means a person who is qualified to perform services related to the federal department of transportation's drug testing program under 49 CFR 40.121.

(d) "Positive alcohol confirmation test" means:

(i) an alcohol confirmation test that has been conducted by a breath alcohol technician under the provisions of 49 CFR, part 40; and

(ii) an alcohol confirmation test that indicates an alcohol concentration of 0.04 or more.

(e) "Substance abuse professional" means a drug and alcohol specialist who meets the requirements of 40 CFR 40.281.

(f) "Verified positive drug test" means a drug test result or validity testing result from a laboratory certified under the authority of the federal department of health and human services that:

(i) indicates a drug concentration at or above the cutoff concentration established under 49 CFR 40.87; and

(ii) has undergone review and final determination by a medical review officer.

(2) ~~A medical review officer or breath alcohol technician hired by or under contract to a commercial motor vehicle operator employer shall report to the department a finding of a Montana-licensed commercial motor vehicle operator's verified positive drug test or positive alcohol confirmation test THAT IS REPORTED TO THE COMMERCIAL MOTOR VEHICLE OPERATOR EMPLOYER BY A MEDICAL REVIEW OFFICER OR BREATH ALCOHOL TECHNICIAN HIRED BY OR UNDER CONTRACT TO THE COMMERCIAL MOTOR VEHICLE OPERATOR EMPLOYER.~~

(3) A commercial motor vehicle operator employer shall report to the department a refusal by a commercial motor vehicle operator to take a drug or alcohol test, under circumstances that constitute a refusal to test under 49 CFR 40.191, ~~if the refusal has not been reported by a medical review officer or breath alcohol technician.~~

(4) A commercial motor vehicle operator employer shall make it a written condition of any contract entered into with a medical review officer or breath alcohol technician, regardless of the state where the medical review officer or breath alcohol technician is located, that the medical review officer or breath alcohol technician is required to make reports to the ~~department~~ COMMERCIAL MOTOR VEHICLE OPERATOR EMPLOYER regarding Montana-licensed commercial motor vehicle operators ~~as provided in [section 2(1)].~~ Failure to obtain the contractual condition or agreement is punishable by a fine of not more than \$100 for each violation.

**NEW SECTION. Section 2. Suspension of commercial driver's license -- report of positive drug or alcohol test -- hearing -- rules -- duration of suspension.** (1) (a) When the department receives a report from a ~~medical review officer, breath alcohol technician, or~~ commercial motor vehicle operator employer that a Montana-licensed commercial motor vehicle operator has had a verified positive drug test or positive alcohol confirmation test or has refused to take a drug or alcohol test conducted under the procedures established in 49

CFR, part 40, the department shall suspend the operator's commercial driver's license, subject to SUBSECTION (8) AND a hearing as provided in this section.

(b) The department shall notify the commercial motor vehicle operator of the suspension in writing by mail.

(c) The notice required in subsection (1)(b) must explain the procedure for hearing.

(2) A person who has received a notice of suspension as provided in subsection (1) may request a hearing to challenge the suspension within 20 days from the date that the notice is postmarked. If a request for a hearing is mailed to the department, it must be postmarked within 20 days after the department has given notice of the license suspension.

(3) The hearing must be conducted in the county where the person whose license has been suspended resides, but the department may conduct all or part of the hearing by telephone or other electronic means.

(4) The hearing must be limited to the following issues:

(a) whether the person whose license has been suspended is the subject of the report referenced in subsection (1);

(b) whether the commercial motor vehicle operator employer has a program that is subject to the federal requirements under 49 CFR, part 40;

(c) whether the medical review officer or breath alcohol technician making the report TO THE COMMERCIAL MOTOR VEHICLE OPERATOR EMPLOYER accurately followed the protocols for testing established to certify the results or, in the event of a report of a person refusing to take a drug or alcohol test, whether the circumstances constitute the refusal of a test under the provisions of 49 CFR 40.191; and

(d) the possibility of false positive test results. Evidence may be presented at the hearing that demonstrates false positive test results.

(5) For the purposes of a hearing as provided in this section, a copy of a positive test result with a declaration by the medical review officer or breath alcohol technician stating the accuracy of the laboratory protocols that were followed to arrive at the test result is prima facie evidence:

(a) of a verified positive drug test or a positive alcohol confirmation test result;

(b) that the commercial motor vehicle operator employer has a program that is subject to the federal requirements under 49 CFR, part 40; and

(c) that the medical review officer or breath alcohol technician making the report TO THE COMMERCIAL MOTOR VEHICLE OPERATOR EMPLOYER accurately followed the protocols for testing established to certify the results.

(6) Following the hearing, the department shall determine whether the suspension may be rescinded or

sustained. If the suspension is sustained, the person whose commercial driver's license is suspended may file a petition for review of the final suspension order with the district court in the county where the person resides.

(7) If a person whose commercial driver's license has been suspended under this section does not request a hearing within the 20-day time limit or if the person fails to appear at a hearing, the person has waived the right to a hearing and the license suspension must be sustained.

(8) A suspension of a commercial driver's license under this section is not in effect while a formal hearing or subsequent appeal to district court is pending if:

(a) the person whose commercial driver's license suspension is the subject of the hearing or appeal is not convicted of a moving violation or cited for a traffic infraction while operating a commercial motor vehicle; and

(b) the department receives no additional reports during the period that the hearing or appeal is pending of the person having had a verified positive drug test or positive alcohol confirmation test.

(9) The department may adopt rules specifying additional requirements for requesting and conducting a hearing under this section and may adopt any other rules necessary for carrying out the provisions of this section.

~~————(10) The department is not civilly liable for damage resulting from suspending a commercial driver's license as a result of a report of a verified positive drug test or positive alcohol confirmation test result or for damage resulting from release of the test result information occurring in the normal course of business in complying with the provisions of this section.~~

~~(11)~~(10) (a) A suspension of a commercial driver's license under this section remains in effect until the person whose license has been suspended:

(i) undergoes a drug and alcohol assessment by a substance abuse professional;

(ii) presents evidence of satisfactory participation in or successful completion of a drug or alcohol treatment or education program as recommended by the substance abuse professional; and

(iii) pays a reinstatement fee of \$100 to the department for reinstatement of the license.

(b) The substance abuse professional shall forward to the department the person's diagnostic evaluation and treatment recommendation, which the department shall use in determining whether the person is eligible for reinstatement.

~~(12)~~(11) Upon receiving a report of a third verified positive drug test or positive alcohol confirmation test result on the same person within a 5-year period, the department shall suspend the person's commercial driver's license for life. The suspension is subject to rules adopted by the department pursuant to federal rules that allow for driver rehabilitation and license reinstatement, if the driver is otherwise eligible, after a minimum period of 10

years' suspension.

~~NEW SECTION. Section 3. Two-thirds vote required. Because [section 2(10)] limits governmental liability, Article II, section 18, of the Montana constitution requires a vote of two-thirds of the members of each house of the legislature for passage. If [this act] is not approved by at least two-thirds of the members of each house of the legislature, then [section 2(10)] is void.~~

NEW SECTION. Section 3. Codification instruction. [Sections 1 and 2] are intended to be codified as an integral part of Title 61, chapter 8, part 8, and the provisions of Title 61, chapter 8, part 8, apply to [sections 1 and 2].

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